

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2008-IA-00645-SCT

MARGARET AND DR. MAGRUDER S. CORBAN                      APPELLANTS

VERSUS

UNITED SERVICES AUTOMOBILE ASSOCIATION  
a/k/a USAA INSURANCE AGENCY                      APPELLEE

ON INTERLOCUTORY APPEAL FROM  
THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

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PROCEEDINGS

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BAILIFF: The Supreme Court of Mississippi is now is session. Chief Justice William L. Waller, Jr. presiding.

JUSTICE WALLER: Please take a seat. Madam Clerk, if you would sound the docket.

COURT CLERK: 2008-IA-645-SCT. Margaret Corban and Magruder S. Corban and United Policyholders Versus United Services Automobile Association, also know as USAA Insurance Agency.

JUSTICE WALLER: Which is the Appellant?

MS. GUICE: We're ready.

JUSTICE WALLER: And the Appellee?

MR. COPELAND: Appellee's ready, Your Honor.

JUDGE: Mr. Copeland. We have I guess got the unusual situation of having amici that are going to argue, and I see that General Hood and Mr. Cupit, on behalf of Nationwide is -- so we've got a little play sheet here.

The way we're going to do it, Ms. Guice, she's going to go first for 20 minutes, followed by Mr. Copeland for 25 minutes. We'll do the amici on behalf of Nationwide third, and the Attorney General fourth.

After which, we will take a short break, and then we will call the Court to order again. And then Mr. Copeland

1 will have 15 minutes, and then Ms. Guice will conclude  
2 with 20 minutes. Does everybody understand the procedure?  
3 Okay.

4 Madam Clerk, you may be excused. And, Ms. Guice, you  
5 may proceed.

6 MS. GUICE: Thank you, your Honor, may it please  
7 the Court, my name is Judy Guice, and I am here along with  
8 my colleagues, Buddy Gunn and Flip Phillips, to represent  
9 the Corbans in this appeal. And to say that we are  
10 privileged and honored to be here would be the  
11 understatement of the year.

12 This is an opportunity that we have waited for, and  
13 many citizens of our State have waited for, for quite some  
14 time.

15 Rarely is the term "Court of last resort" used in  
16 referring to this Honorable Court in a civil case more  
17 aptly than where we stand today.

18 Over the past almost four years now, courts, federal  
19 courts from all over the country, not just our Mississippi  
20 Federal Courts, not just the Fifth Circuit Court of  
21 Appeals, but federal courts from states far and wide that  
22 have had occasion, for whatever reason, to have to deal  
23 with a Hurricane Katrina loss occurring in the State of  
24 Mississippi have guessed at our state's law.

25 And now to finally have the opportunity to get from

1 the Court of last resort a pronouncement that will apply  
2 in all of those cases and assist all of those courts is an  
3 honor and a privilege.

4 Much has been written in all of the legal papers that  
5 you have had presented to you, many arguments made;  
6 insufficient time obviously exists to address them all. I  
7 am here today hopefully prepared to answer whatever  
8 questions your Honors may have.

9 In the meantime, though, I would like to address with  
10 you my understanding and my perception of what I think are  
11 the critical core issues that have taken the wrong course  
12 in this insurance aftermath of Hurricane Katrina.

13 The critical core issue, in my humble opinion, is:  
14 When a hurricane loss is caused by a hurricane that has  
15 separate components, that has weather components of rain,  
16 weather components of wind, weather components of flood,  
17 and the precise cause of the loss cannot be precisely  
18 determined, it is indivisible, it is indiscernible, what  
19 is to be done? Is the loss covered? Is it not covered?

20 The term "indivisible loss" has been used by the Fifth  
21 Circuit of Court of Appeals and by the lower courts in the  
22 Federal Court system, as well as by Counsel opposite, to  
23 describe a scenario where the cause of the loss is  
24 unknown, or perhaps it is caused by a combination of wind  
25 and water.

1 As we know, this is a policy affectionately referred  
2 to as an all risk policy. And as we know, an all risk  
3 policy, and in particular this policy, covers all risks of  
4 direct physical loss, other than those that are precisely  
5 excluded under the policy.

6 As we also know from basic hornbook law, very clear in  
7 Mississippi, under an all risk policy and in cases where  
8 as here the insurer mouths an affirmative defense in  
9 exclusion under the policy to coverage, then it is the  
10 insurer's responsibility to establish, as the Court  
11 recently said using the language "clearly and  
12 unmistakably" that the exclusion applies.

13 Clearly and unmistakably. We submit that that is the  
14 core issue that establishes the error of the Fifth Circuit  
15 Court of Appeals because when the insurer has the  
16 responsibility to establish clearly and unmistakably that  
17 an exclusion applies, and they can't do it because the  
18 loss is indivisible, because the loss is caused perhaps by  
19 a combination of forces that we don't know how to  
20 allocate, when it is their responsibility, they have to  
21 pay the entire loss.

22 I know it's a legal question, but let's face it, the  
23 law is not created in a vacuum, and the facts do help  
24 illustrate why the issue is so important, and I submit how  
25 there have been perhaps some missteps along the way.

1 Frankly, I believe part of the Fifth Circuit's  
2 equation that they were missing were some of these  
3 critical facts that we have learned by being on the  
4 ground, and seeing the devastation of this storm, and  
5 seeing how these decisions impact us.

6 So for a moment I would like to digress and talk about  
7 Dr. And Ms. Corban's home, their lovely, lovely home in  
8 Long Beach, Mississippi.

9 Mr. Gunn is showing us a photograph of the beautiful  
10 home in its pre-Katrina grandeur. Located in Long Beach,  
11 Mississippi, it was elevated to an elevation of 18 feet.  
12 As you see, like many Gulf Coast homes, it was constructed  
13 architecturally to take advantage of the lovely  
14 environment in which it was situated.

15 And that architectural features show us that, for  
16 example, all the way on the right side as the Court looks  
17 at it, a large section of the home was enclosed entirely  
18 by glass.

19 We see extending from the very front of the porch is  
20 an architectural feature known as a porte cochere, which  
21 frankly I was not familiar with prior to this case. But  
22 it's basically a fancy term for a carport that goes out on  
23 the front. In other words, it's a separate section of  
24 roofing that extends from the front of the home on columns  
25 that go down, and it's a porte cochere.

1 We also see that there is a porch on the entire front  
2 of the home, and that porch also has separate roofing,  
3 which is attached to the exterior walls, and the separate  
4 roofing that's attached to the porte cochere, and the  
5 separate roofing that's attached to the glassed-in section  
6 of the home.

7 Buddy, let's look at that next photo because I want to  
8 show your Honors that the glassed exterior extends all the  
9 way around the side of the home. In other words, there is  
10 a large feature of a glass exterior wall here designed  
11 take advantage of the lovely environment on which the home  
12 is situated.

13 We also can see in the back that, again, there is an  
14 overhang of the same type of separate roofing here  
15 attached to the exterior wall. And this is a side view of  
16 the porte cochere that shows how it extends out. Thank  
17 you, Buddy.

18 We will see in after photographs of Hurricane Katrina  
19 that are in the record and have been put into the briefs  
20 as well - I believe Mr. Copeland is going to show one -  
21 that what happened to the Corban home was that the  
22 porte cochere, the separate roofing attached to the  
23 exterior wall that went all the way around the home, and  
24 in particular the entire exterior glass portion of the  
25 home was ripped away from the home as a result of



1 Hurricane Katrina.

2 JUSTICE DICKINSON: Ms. Guice, may I ask you a  
3 question?

4 MS. GUICE: Certainly, Your Honor.

5 JUSTICE DICKINSON: We're here because a trial  
6 judge granted a summary judgment.

7 MS. GUICE: Yes, your Honor.

8 JUSTICE DICKINSON: And in effect, the summary  
9 judgment prevented a jury a finder of fact from deciding  
10 what damage was caused by wind and what damage was caused  
11 by water.

12 There will be no such determination, I guess, if the  
13 Trial Judge's summary judgment is applied to sort of as a  
14 blanket determination of everything that happened in one  
15 particular part of the house.

16 Why -- juries have never been prevented from hearing  
17 evidence from both sides and making a jury determination  
18 of what damage was caused, for instance, by one tort-  
19 feator and one by another, or what was exacerbated and  
20 what was preexisting and that sort of thing.

21 Why isn't this simply a case where a jury hears the  
22 evidence, what happened as you're presenting us here  
23 today, and the jury decides based on the evidence  
24 presented what damage was caused by water, which would be  
25 excluded, and what damage was caused by wind, which would

1 be covered?

2 MS. GUICE: Thank you for asking that question,  
3 Justice Dickinson.

4 Frankly, what has happened here is that the lower  
5 court, construing the decisions from the Fifth Circuit  
6 Court of Appeals, entered a pretrial order saying  
7 basically that the Corbans would only be able to recover  
8 for that damage which the Corbans could prove was caused  
9 by wind alone.

10 In other words, if the proof was lacking as to the  
11 cause, or if any portion of the loss was caused by a  
12 combination of wind or water, or if one just simply  
13 couldn't determine what the loss was, the Court was  
14 prepared to instruct the jury they could not find for the  
15 Plaintiffs on that type of proof.

16 And I submit to you that under clear Mississippi law  
17 governing all risk insurance policies, the burden is not  
18 on the Plaintiff to prove that the loss was caused by  
19 wind. The burden is on the Plaintiff to prove that the  
20 loss was an accidental direct physical loss. That's what  
21 the policy covers.

22 And USAA admits that all the losses to the Corban home  
23 were accidental direct physical loss. At that point, the  
24 responsibility of establishing the applicability of an  
25 exclusion should shift to USAA; that simply.

1 And if USAA cannot prove what caused the loss, if they  
2 can't prove that it was caused solely by water, any  
3 particular part, if they can't prove that the glass wasn't  
4 broken before the water got there and ripped off the porch  
5 and ripped off the porte cochere, if they can't prove  
6 that, then the Plaintiff should recover for all the loss.

7 JUSTICE DICKINSON: And your position is that, if  
8 it were to go to trial properly presented to a jury and  
9 with the jury properly instructed, the jury would just  
10 simply determine based on the fact that it's instructed at  
11 the burden of proof with respect to what would be excluded  
12 is on the Defendant, once the jury is properly instructed  
13 in that manner, the jury would just simply determine what  
14 had and hadn't been proven here, and they would determine  
15 what the damages are. Is that your position?

16 MS. GUICE: That is my position, your Honor. That  
17 is my position.

18 And I see it strictly as proper instructions to the  
19 Court. But where we have gotten off track is the law has  
20 gotten incorrect. The law has gotten in error, and so  
21 juries are not being instructed properly concerning the  
22 burdens of proof.

23 And so juries are being told that, if it's caused by a  
24 combination of wind and water, if you can't tell what the  
25 cause is, or if water touched it -- that's something else

1 that they're being told basically is that if the water  
2 played any part in the loss, then it's not covered.

3 And they're blaming that result on the policy's  
4 anti-concurrent cause clause. But actually the  
5 anti-concurrent cause clause has no application whatsoever  
6 to a situation that we're dealing with in Hurricane  
7 Katrina cases, where wind comes along for 10, 12 hours,  
8 blows and causes damage, then water comes along for some  
9 period of time and causes damage, and then the wind blows  
10 some more and causes other damage.

11 JUSTICE PIERCE: Ms. Guice, do you have to, to  
12 get to that question, do you have to define or declare to  
13 this Court that the anti-concurrent clause is void, is  
14 ambiguous? Or can you just say it doesn't apply, and  
15 therefore let the jury determine whether or not we -- as a  
16 question of fact whether or not it was wind versus water?

17 MS. GUICE: I think you can say that it does not  
18 apply. I do not think it's necessary to strike any  
19 portion of this insurance policy.

20 In fact, we are here to defend the policy. We are  
21 here to embrace the policy and to say please let the  
22 policy apply. Because heretofore the policy has not  
23 applied. Heretofore, because of erroneous decisions from  
24 the Fifth Circuit, the policy has been rewritten, and it  
25 has been rewritten exactly contrary to what Mississippi

1 law says should happen if you have any doubt.

2 Under clear Mississippi law, if there's doubt, it's to  
3 be resolved in favor of the insureds. It's to be resolved  
4 in favor of the Corbans. But the Fifth Circuit has taken  
5 the anti-concurrent cause clause portion of the water  
6 damage exclusion and said that that applies to wind damage  
7 too, which it clearly doesn't. It clearly does not.

8 Now, if it did, if the insurance company did attempt  
9 to write a policy that would exclude wind damage, which is  
10 specifically covered by the policy, not only as part of an  
11 accidental direct physical loss, but on page one when they  
12 have a separate deductible for wind, if they were then on  
13 page 51 to try to exclude it out by such a nebulous  
14 indirect exclusion as the ACC clause, then I would submit  
15 that this Court would have the duty and obligation to  
16 strike that clause as void.

17 But I think if properly construed, the ACC does not  
18 apply. Because the ACC was designed to take care of  
19 situations where one force causes another force, and those  
20 two things acting together causes a loss.

21 It's easier to understand than it is to say,  
22 unfortunately, but examples help. And an example I submit  
23 would be similar to the situation in USF&G versus Martin  
24 that the Court recently decided.

25 There the flood caused the sewage back-up, but there

1 was only one loss. It's just that the issue was, is that  
2 loss covered.

3 It wasn't a situation where there was a flood, and  
4 that flood caused loss, and then there was a sewage back-  
5 up, and that caused different loss, okay. That's the  
6 situation with Hurricane Katrina.

7 Instead, it was a situation where you had the flood  
8 causing sewage back-up. And because there was a conflict,  
9 because the covering part of the policy said that the  
10 sewage back-up was covered, and the excluding part  
11 suggested that it wasn't, then the Court properly held  
12 that the exclusion did not apply.

13 Other examples would be in the federal earth movement  
14 cases that have been relied on by the insurers, the Rhoden  
15 decision, and the Boteler decision, the Court of Appeals  
16 -- Mississippi Court of Appeals decision in Boteler.  
17 There you have, for example, a broken pipe causing earth  
18 movement. The broken pipe causes the earth to move and  
19 results in damage to the foundation of the home - one  
20 loss; one cause.

21 But what happened was, over the years, particularly  
22 California courts, were going back in time so far  
23 overreaching to try to find some covered cause somewhere  
24 in the metaphysical line of causation. That's what  
25 created the ACC.

1       Never designed to apply to a loss by one force, wind  
2       here causing some damage, and then a loss by another  
3       force, water later, causing another damage.

4       And you can read actually the article from State  
5       Farm's General Counsel, who was involved in writing the  
6       language, you know. It makes clear that the Fifth Circuit  
7       was wrong in deciding it the way they did.

8       In fact, all the legal scholars -- this isn't just a  
9       plaintiff's lawyer saying the decision is wrong. All the  
10      legal scholars that have written on this have pointed out  
11      the error of the Fifth Circuit. The Loyola Law Review  
12      article we cited in our reply brief goes into great detail  
13      and great explanation about explaining why an indivisible  
14      loss is always covered.

15      An indivisible loss caused by two independent forces  
16      like we have in Hurricane Katrina is always covered.  
17      Why? Because the insurer cannot meet its burden of  
18      proof. Because if it's indivisible, the insurance company  
19      cannot meet its obligation.

20      The insurance company wrote the policy. They started  
21      out with a blank sheet of paper. They could have written  
22      any policy they wanted to. They could have written a  
23      policy that said, 'We cover loss from hurricanes, only if  
24      no water is involved.' They could have done that.  
25      Instead they chose to write an all risk policy, a policy

1 that covered all risks of direct physical harm unless  
2 excluded.

3 They then chose to write the exclusion in such a  
4 manner that it does not apply in this situation. And so  
5 it's only fair, it's only right, that they having written  
6 the policy should be required to live by it because the  
7 Corbans could only choose among the various policies  
8 available.

9 The Corbans, for the 50 years they were with this  
10 company, paid their premiums based on the promise that,  
11 when the time came for USAA to step up to the plate, that  
12 they would do their part. They didn't do it.

13 All this Court is required to do to get our law  
14 back -- to get our law back is to apply the law as it has  
15 been written by this Court and the courts before it for  
16 decades. That's all we ask.

17 JUSTICE RANDOLPH: Ms. Guice?

18 MS. GUICE: Yes, your Honor?

19 JUSTICE RANDOLPH: I'm surprised that you take  
20 the position that it's an indivisible loss, and I want to  
21 better understand that.

22 In reviewing the testimony presented to us, the USAA  
23 adjuster in the record on page 243 states that water  
24 damage can easily be defined separate and apart from wind  
25 damage.



1 Mr. Corban, in his deposition, takes the position that  
2 there's a distinction. Mr. Biddy in his report takes the  
3 position that there's a difference.

4 Now, I was surprised when I read the Fifth Circuit  
5 opinions that talk about indivisible damage, so I want to  
6 talk about that a second, and I want you to talk about  
7 it.

8 First of all, is the term "loss," just loss, l-o-s-s,  
9 is that defined in the policy?

10 MS. GUICE: No, your Honor, it is not.

11 JUSTICE RANDOLPH: Is "damage" defined in the  
12 policy?

13 MS. GUICE: No, your Honor, it is not.

14 JUSTICE RANDOLPH: And so I sort of charted this  
15 thing out. But if you had wind insult with no damage,  
16 then there would be no duty for anybody to pay anything  
17 for wind loss.

18 And if water follows that and causes damage, then  
19 whatever water coverage you have got, you have.

20 Then let me back up on water and make sure because  
21 your time is running short, and you didn't talk about the  
22 storm surge and whether we should treat that as flood or  
23 not. Are you standing on your briefs on that issue?

24 MS. GUICE: Yes, your Honor.

25 JUSTICE RANDOLPH: Okay. And so from that

1 standpoint, if you have wind, and it causes X amount of  
2 damage, you have a loss. Do we agree?

3 MS. GUICE: Yes, your Honor.

4 JUSTICE RANDOLPH: Well, what I'm trying to  
5 figure out is, once the property is lost, then how do I  
6 regain it to lose it again with water?

7 MS. GUICE: And that's what Judge Senter finally  
8 reached that conclusion in the Dickinson case.

9 JUSTICE RANDOLPH: But that's two separate  
10 losses. It's not indivisible.

11 MS. GUICE: Yes, your Honor.

12 JUSTICE RANDOLPH: But it's your position it's  
13 indivisible damage?

14 MS. GUICE: I need to clarify how I'm using the  
15 term "indivisible."

16 JUSTICE RANDOLPH: Please do.

17 MS. GUICE: And I appreciate your Honor, Justice  
18 Randolph, allowing me that opportunity.

19 When I use the term "indivisible loss" what I mean is  
20 a loss where you cannot determine precisely and  
21 objectively what the cause was; in other words, whether it  
22 was water or whether it was wind.

23 JUSTICE RANDOLPH: So you're not talking about  
24 indivisible in the sense that it's caused by equal forces  
25 or --

1 MS. GUICE: No, your Honor.

2 JUSTICE RANDOLPH: -- or combined forces? The  
3 term "concurrent," is it defined in the policy?

4 MS. GUICE: Concurrent is not defined, nor is  
5 sequential.

6 JUSTICE RANDOLPH: Well, I was going to ask you  
7 in taking the depositions and preparing for the case, has  
8 anybody taken a position how long this sequence last in  
9 any sequence?

10 MS. GUICE: I believe Mr. Biddy and Mr. Calacci  
11 both - those are the plaintiff's experts - in their  
12 reports --

13 JUSTICE RANDOLPH: I'm talking about from USAA.

14 MS. GUICE: Oh, no, your Honor. In fact, the  
15 USAA adjuster whose deposition, as your Honor has quoted  
16 already is in the record, he didn't even know anything  
17 about the architectural features of the home. He did not  
18 know that half of the front and side of the home was  
19 glassed.

20 He reached his conclusion that it was flood based on  
21 the fact that water came through there.

22 JUSTICE RANDOLPH: Well, Hurricane Ivan lasted  
23 about 22 days, if I recall right. So under the way that  
24 the policy is being presented to your client, if you had  
25 wind on the first day of the storm, and on the 22nd day

1     you had water, would that be in the sequence?

2             MS. GUICE: I think that we would have to wait  
3     and see when that storm came up, and then they would  
4     probably tell us, Judge. That's how it has been working.

5             I will say that on their earthquake provision, which I  
6     found interesting because Mr. Corban -- Dr. Corban was  
7     very well prepared for any risk, he even had earthquake  
8     coverage with USAA.

9             On their earthquake provision, they actually have a  
10    specific language in there that says that any earth tremor  
11    occurring within 72 hours is considered one loss.

12            JUSTICE RANDOLPH: So there is a time distinction  
13    on earthquake?

14            MS. GUICE: There is on earthquake. And I would  
15    submit if they wanted to do something like that on  
16    hurricane and consider it all one loss, they could do it  
17    just like they did on the earthquake.

18            JUSTICE RANDOLPH: Is there any dispute in the  
19    record regarding the timing that the winds came minimally  
20    four hours before any water came up on the property?

21            MS. GUICE: Mr. Biddy's depositions,  
22    Mr. Calacci's depositions and Dr. Corban's knowledge are  
23    all undisputed.

24            JUSTICE RANDOLPH: But USAA, have they offered  
25    any evidence otherwise that there's a distinct time,

1 whatever it is, a matter of hours difference between when  
2 wind first arrived and when water first arrived?

3 MS. GUICE: They may have submitted in pretrial  
4 discovery some meteorological report; however, that is not  
5 in the record at this time.

6 JUSTICE WALLER: Ms. Guice, you reserved 20  
7 minutes in rebuttal. We have run over now.

8 MS. GUICE: Yes, your Honor.

9 JUSTICE WALLER: So does anybody have any further  
10 questions?

11 (No response.)

12 JUSTICE WALLER: Okay.

13 MS. GUICE: Thank you for the opportunity.

14 MR. COPELAND: If it please the Court, I'm Greg  
15 Copeland. I'm here today on behalf of USAA Insurance. I  
16 have with me helping assist me my partners, Janet Arnold  
17 and Bobby Thompson.

18 And if I could impose on the Court, I would like to  
19 pull up a chart as well. And Ms. Guice has a copy. She  
20 has inspected this copy. This is what I would like to  
21 talk about with the Court today.

22 JUSTICE RANDOLPH: Can you give us the record --  
23 where that comes out of the record today?

24 MR. COPELAND: Yes, your Honor. It's in the  
25 record in the insurance policy, but the easiest and

1 fastest source from it is in Ms. Guice's brief on page  
2 six. It's throughout the brief. This is the operative  
3 language that we're here to talk about.

4 And, in fact, this sentence is what I want to talk to  
5 the Court about right here.

6 First let me tell the Court what - since this is what  
7 we were taught to do - what it is that USAA seeks of this  
8 Court.

9 USAA seeks from this Court an affirmance of Judge  
10 Dodson's order that the Corbans should recover for all  
11 damage to the house caused by wind, and should not recover  
12 for any damage to the house that USAA has proved was  
13 caused or contributed to by storm surge flooding.

14 The direct quote on page nine of her order, page 20 of  
15 the record excerpts, "The Corbans may not recover for any  
16 damage caused by water as defined in the policy or a  
17 combination of that wind and water."

18 The second thing that USAA comes before this Court  
19 asking is that the Court affirm the second order of Judge  
20 Dodson. Judge Dodson held that the jury should be  
21 informed that the Corbans filed a claim for and accepted  
22 \$350,000 in flood benefits.

23 Those are the two issues we're here about today.  
24 Judge Dickinson asked if this case is affirmed, how will  
25 it sit with the jury. The way that it will sit with the

1 jury is that the jury will be instructed that USAA has the  
2 burden of proving by a preponderance of evidence what  
3 damage was caused or contributed to by storm surge  
4 flooding. And that if they don't meet that burden, the  
5 jury should award money damages for such damage. And  
6 that's what Judge Dodson did.

7 Judge Dodson began establishing the law for the  
8 instructions. This case is a long way from being  
9 through. There are lots of facts. Let me just stop right  
10 now.

11 JUSTICE RANDOLPH: Let me stop you right now.

12 MR. COPELAND: Yes, sir.

13 JUSTICE RANDOLPH: I'm reading your poster, and  
14 it says, "Such loss is excluded regardless of any other  
15 cause."

16 MR. COPELAND: Yes, sir.

17 JUSTICE RANDOLPH: But I'm writing down what  
18 you're arguing, and you're arguing damage caused or  
19 contributed.

20 MR. COPELAND: Yes, sir.

21 JUSTICE RANDOLPH: Is damage or loss, are those  
22 synonymous terms with you or USAA?

23 MR. COPELAND: As I use them, yes, your Honor.

24 JUSTICE RANDOLPH: For purposes of this case, are  
25 they synonymous terms?

1           MR. COPELAND; yes, your Honor. If we're talking  
2 about physical damage to property, that is a loss under  
3 the policy.

4           JUSTICE RANDOLPH: Direct physical loss?

5           MR. COPELAND: Yes, direct physical damage is a  
6 loss.

7           JUSTICE RANDOLPH: And if one suffers direct  
8 physical loss due to wind first --

9           MR. COPELAND: Yes.

10          JUSTICE RANDOLPH: -- and then if water comes  
11 later, what's USAA's position? Should it pay or not pay?

12          MR. COPELAND: Let me state all of that. USAA  
13 pays for all the wind. It does not matter if the wind  
14 comes first, concurrent or last, USAA pays for all the  
15 wind. It does not matter that the wind knocked down half  
16 a wall, and the water knocked down the other half; USAA  
17 pays for the half that was knocked down.

18          There's a famous example that Judge Jones used in the  
19 Leonard -- excuse me -- not Judge Jones -- yes, Judge  
20 Jones in the Leonard case where she said, "The wind tore  
21 off the roof. The rainwater came in. The rainwater wet  
22 the carpet. The storm surge came later." She talks about  
23 whether or not that ensuing loss is covered.

24          There's been a lot of controversy about what the word  
25 "ensuing" means. We view it as the following -- let me



1 tell you how USAA would do that. We would pay for the  
2 torn off roof. We would pay for the rain damage to the  
3 carpet. It does not matter to us that the storm surge  
4 later came and inundated that carpet. That is not USAA's  
5 position. That is not the way that USAA has handled the  
6 Corban's case.

7 The record is undisputed that USAA paid for the damage  
8 to the roof of this house. The record is undisputed from  
9 our position, it's clear that our engineers found that a  
10 portion of the roof collapsed because of the water  
11 destroyed the support structure underneath.

12 Nevertheless, even though that roof had been destroyed  
13 by storm surge, we still paid for the roofing on it  
14 because we felt that was a separate damage that could be  
15 parsed out. If you can parse out wind, we pay for it.

16 JUSTICE DICKINSON: Wait a minute now. You're  
17 saying if you can parse out wind. I thought I understood  
18 you to be accepting Ms. Guice's position that it's USAA's  
19 burden to prove what damage was caused by water, and the  
20 damage they can't prove was caused by water, USAA pays.

21 MR. COPELAND: Your Honor is exactly correct.

22 JUSTICE DICKINSON: And if that's correct, then  
23 Ms. Guice's concern about those damages and losses that  
24 nobody can tell what caused it, you're going to pay?

25 MR. COPELAND: Yes, your Honor. First of all, I

1 apologize for the word "you;" it was the universal you.

2 If we can prove if, if we can prove it to a jury's  
3 satisfaction by a preponderance of the evidence that it  
4 was caused or contributed to by water, then we shouldn't  
5 pay it. If we can't meet that burden of proof, we should  
6 pay it.

7 There's been a word here called "indivisible." I see  
8 indivisible like "One nation, under God, indivisible."  
9 Indivisible cannot be separated. It's the word that was  
10 used in the Leonard decision, "synergistic" - two forces  
11 acting at the same time.

12 There are three destructive forces that are going on;  
13 three destructive forces - wind, pure wind. Damage or  
14 loss caused by pure wind, we pay for it. No ifs, ands or  
15 buts, we pay for it. We pay for that whether there's an  
16 ACC clause or not.

17 Damage caused purely by storm surge flooding, we don't  
18 pay for it. We pay for that whether there's -- we don't  
19 pay for that whether there's an ACC clause or not.

20 The policy clearly says, "We do not cover water damage  
21 - flooding." We don't cover that.

22 It's the third damage that this second sentence of the  
23 ACC clause addresses. And that third type alone, that is  
24 the combination. The word "indivisible" means it cannot  
25 be divided. There's another word: Indeterminable.

1 Indivisible does not mean indeterminable.

2 If it is indeterminable, we have not met the burden of  
3 proof, and we pay for it. We accept that burden of  
4 proof. It has been so, and it will continue to be so.

5 So don't get confused between indivisible, which means  
6 it was synergistic, two forces -- It took both forces  
7 acting at one time to cause the damage. Do not get  
8 confused with that and indeterminable, we cannot meet the  
9 burden of proof.

10 We fully accept our burden of proof to prove by a  
11 preponderance of the evidence.

12 JUSTICE DICKINSON: Give us an example Of  
13 indivisible.

14 MR. COPELAND: You have a young architect, and he  
15 decides to build a fancy home. And he puts a huge glass  
16 front on it. And he builds that glass front out of  
17 tempered glass and photosensitive glass, and it's very  
18 expensive. And it will withstand 100 pounds per square  
19 inch of pressure.

20 The wind comes, and the wind blows at whatever speed  
21 it takes to establish pressure of 50 pounds per square  
22 inch. The glass is just fine. It was within its designed  
23 parameters. It's not weakened or damaged.

24 The storm surge comes and adds 70 psi. Now your total  
25 is 120 psi, and the glass collapses.

1 JUSTICE DICKINSON: At the same time?

2 MR. COPELAND: At the exact same time.

3 Synergistic. Indivisible. Now --

4 JUSTICE RANDOLPH: Let me ask you about it, since  
5 you're on synergistic, because that was used in the  
6 Leonard opinion.

7 MR. COPELAND: Yes.

8 JUSTICE RANDOLPH: There's no evidence that I've  
9 seen in this case that we had a synergistic event.

10 MR. COPELAND: That's exactly right.

11 JUSTICE RANDOLPH: Do you agree?

12 MR. COPELAND: Agreed.

13 JUSTICE RANDOLPH: Okay.

14 MR. COPELAND: It is, as pointed out in Judge  
15 Senter's latest opinion, the Dickinson versus State Farm  
16 opinion, it is the rare instance, as is pointed out in the  
17 article written by Rossmiller, it is -- Rossmiller and  
18 Senter, before he wrote the last Dickinson opinion, had  
19 convinced themselves that the only types of damage were  
20 all wind or all water.

21 Please understand USAA is not arguing that sequence is  
22 of any importance here. What we are arguing is, what do  
23 you deal with that third category, the one that's caused  
24 synergistically at the same time by two combined forces?  
25 It has to be covered, and it is covered. But it's not

1 covered in a homeowner's policy. There is a system in  
2 place for that type of loss.

3 JUSTICE DICKINSON: But you don't have that kind  
4 of loss in this case?

5 MR. COPELAND: Not that I can point to, your  
6 Honor. But the jury --

7 JUSTICE DICKINSON: Then why are we dealing with  
8 it, if you don't have it in this case?

9 MR. COPELAND: Because the Judge ruled that --  
10 and her jury instruction would have said it. In fact, let  
11 me direct the Court -- Judge Dodson said at one point that  
12 she felt closer to the Federal District Court.

13 What she feels close to is the jury instruction that's  
14 in the record at page 282 of the record. It's jury  
15 instruction C1A from the Aiken versus USAA case that was  
16 given by Judge Senter.

17 And in that case, Judge Senter said, "USAA has the  
18 burden of proving by a preponderance of the evidence what  
19 portion of the Plaintiff's windstorm losses were caused or  
20 contributed to" - caused or contributed to - "by storm  
21 surge flooding. And to the extent that USAA meets its  
22 burden of proof, it does not owe the Plaintiffs policy  
23 benefits for the losses caused or contributed to by storm  
24 surge flooding."

25 I wrote that instruction. I submitted that

1 instruction to Judge Senter, and he granted that  
2 instruction. And that is USAA's position. You must deal  
3 with caused or contributed to.

4 I don't see caused or contributed to in this case, but  
5 when the facts come on, when you go through each window,  
6 each window pane, each piece of roof -- and USAA does  
7 that. It parses out the wind where it can find it.

8 If we can find a broken window, we want to pay for it,  
9 even though the storm surge may have later taken down the  
10 whole house. So --

11 JUSTICE RANDOLPH: Let me stop you, since you're  
12 on page 282, and I'm looking at my copy of it.

13 First paragraph, "Plaintiffs' USAA policy provides  
14 that windstorm losses caused or contributed to by storm  
15 surge flooding are an exception to the coverage."

16 MR. COPELAND: Pardon me, Justice Randolph; what  
17 page?

18 JUSTICE RANDOLPH: First paragraph.

19 MR. COPELAND: First paragraph of the  
20 instruction?

21 JUSTICE RANDOLPH: Of the instruction.

22 MR. COPELAND: Yes.

23 JUSTICE RANDOLPH: On page 282.

24 MR. COPELAND: Yes. And pardon me, but I didn't  
25 hear the question.

1 JUSTICE RANDOLPH: Well, what I'm not seeing in  
2 that instruction and with that chart you have in front of  
3 me -- the chart says, "Such loss is excluded regardless of  
4 any other cause or event contributing concurrently." And  
5 the instruction just talks about caused or contributed,  
6 but it leaves out "concurrently."

7 MR. COPELAND: If I may. "A cause or event  
8 contributing concurrently or in sequence." Is there  
9 anything else?

10 JUSTICE RANDOLPH: Well, you just said that  
11 sequence is of no issue in this case.

12 MR. COPELAND: Nor is it concurrent. Your Honor,  
13 if you think about it momentarily, the parenthetical of  
14 this here, everything that ever happens is either  
15 concurrent or in sequence. That's all there is. It can  
16 either happen one behind the other or at the same time.  
17 That's all there ever is.

18 The word that's important here is "contributed."  
19 That's the word that the commentators and Judge Senter  
20 have focused on.

21 JUSTICE RANDOLPH: And you think that's the one  
22 that Mr. Corban focused on?

23 MR. COPELAND: I think Mr. Corban was aware that  
24 his USAA insurance policy did not provide for flood  
25 coverage. He was aware that Congress had mandated a

1 National Flood Insurance Program.

2 He purchased from the National Flood Insurance Program  
3 \$250,000 in structure coverage, \$100,000 in contents  
4 coverage.

5 In 1968 Congress established the National Flood  
6 Insurance Program as a result of the Coastal people  
7 petitioning Congress after Hurricane Betsy. And they  
8 said, "We need a better method for flood coverage." And  
9 Congress took the flood coverage, and the private  
10 insurance industry quit writing primary flood coverage in  
11 homeowner's policies. And the NFIP policies benefit  
12 from --

13 JUSTICE CHANDLER: Mr. Copeland --

14 MR. COPELAND: Pardon me. I'm sorry.

15 JUSTICE CHANDLER: Let me ask you now, do forces  
16 acting concurrently result in a synergistic force?

17 MR. COPELAND: They could, or they could not.

18 JUSTICE CHANDLER: Well, I Thought you said  
19 earlier, if there were a force of wind at 50 miles per  
20 hour or per square inch and water at 70, and the window  
21 could withstand 100, those two total 120, and you pay for  
22 it.

23 MR. COPELAND: We will.

24 JUSTICE CHANDLER: But your policy indicates that  
25 you do not pay for concurrent forces.



1 MR. COPELAND: I'm sorry, your Honor. The  
2 answer to that is we do not. I'm sorry. I was thinking  
3 ahead.

4 We do not pay for damage caused or contributed to by  
5 storm surge flooding. That damage to that window would  
6 not have occurred but for storm surge flooding.

7 JUSTICE DICKINSON: Is that your definition?

8 MR. COPELAND: But for?

9 JUSTICE DICKINSON: Right here. Is that your  
10 definition?

11 MR. COPELAND: But for?

12 JUSTICE DICKINSON: You're saying that that  
13 clause only comes into effect and has meaning where  
14 there's two sources of damage, and but for --

15 MR. COPELAND: Yes.

16 JUSTICE DICKINSON: -- but for the excluded cause  
17 that would have -- you can prove there would have been no  
18 damage?

19 MR. COPELAND: Yes.

20 JUSTICE DICKINSON: Let me just ask you because I  
21 want to get to my question before you get off on --

22 MR. COPELAND: The answer is yes.

23 JUSTICE DICKINSON: Here's my bottom line  
24 question: What exactly is it that you and Ms. Guice  
25 disagree on? I'm trying to understand what the case is

1 about.

2 MR. COPELAND: Well, that's -- your Honor, that's  
3 a very interesting question. I'm glad you asked.

4 The Fifth Circuit, as much as I would have liked  
5 them to, did not pay me to come here and defend their  
6 opinions.

7 JUSTICE DICKINSON: They don't pay us, either.

8 MR. COPELAND: They didn't pay me, Nationwide  
9 didn't pay me, nor did State Farm, nor did any other  
10 insurance company.

11 And what is before this Court is the insurance policy  
12 of USAA and how USAA applies its policy.

13 And what went before Judge Dodson was the insurance  
14 policy of USAA and how it applies its policy. And what  
15 she ruled was all wind -- the burden of proof is on us.  
16 Now, let me --

17 JUSTICE DICKINSON: Please don't forget my  
18 question. At some point today, I would like to go back to  
19 my office written down on this piece of paper with what it  
20 is that you and what it is that Ms. Guice believes y'all  
21 disagree on.

22 MR. COPELAND: Yes, sir.

23 JUSTICE DICKINSON: Because as it stands, I don't  
24 understand what this disagreement is.

25 It seems to me like you both want to go back to trial,

1 you both agree the jury should be instructed that  
2 Dr. Corban and his wife will recover all of their losses,  
3 unless you can prove some of those losses were caused by  
4 an exclusion.

5 MR. COPELAND: Yes, sir.

6 JUSTICE DICKINSON: And I thought that's what  
7 Ms. Guice's position was. If I'm missing it, I'm sure  
8 she's going to let me know in a minute.

9 But other than that, why are we here?

10 MR. COPELAND: Your Honor, we're here about that  
11 one of the three possible mechanisms. We're here about  
12 that mechanism when you have a synergistic loss, a loss  
13 that was contributed to.

14 JUSTICE DICKINSON: You believe that Ms. Guice's  
15 position is -- you believe that Ms. Guice's position is  
16 that, even if you come to Court and prove to the  
17 satisfaction of a jury, 'Here is a window that was broken,  
18 the breaking of the window was caused by both wind and  
19 water, if it hadn't been for water, this window would not  
20 have broken,' but she wants you to pay for it anyway?  
21 That's what you think?

22 MR. COPELAND: If that's not her position, your  
23 Honor, we shouldn't be here.

24 JUSTICE DICKINSON: Okay, now I understand.

25 MR. COPELAND: Because that is the -- as I see

1 it, that's what it narrows down to.

2 Now let's don't forget the admission of the flood  
3 insurance that's the second issue in this appeal, the  
4 admissibility of the fact that the Corbans received  
5 \$350,000. But other than that, that is the issue.

6 JUSTICE RANDOLPH: What did they receive under  
7 the flood policy for wind losses?

8 MR. COPELAND: Pardon me, your Honor?

9 JUSTICE RANDOLPH: What did they recover under  
10 the flood policy for wind losses?

11 MR. COPELAND: Nothing.

12 JUSTICE RANDOLPH: But the suit is over wind  
13 losses?

14 MR. COPELAND: Yes. But it's an admission  
15 against interest, your Honor. It's clearly that. They  
16 would go to the jury today and say --

17 JUSTICE RANDOLPH: Let me walk you through this.  
18 In this case, it probably fits well. You've got one  
19 million dollars coverage ballpark, and a half a million  
20 loss. And you have \$250,000 dwelling coverage under flood  
21 --

22 MR. COPELAND: Yes, sir.

23 JUSTICE RANDOLPH: So if there's \$250,000 wind  
24 loss, there's no set-off involved in that, is there?

25 MR. COPELAND: I'm not asking for a set-off, your

1 Honor.

2 JUSTICE RANDOLPH: You're asking for what?

3 MR. COPELAND: I'm asking for an admission  
4 against interest. I'm asking for the jury to know that  
5 the Corbans have not always said that their loss was 100  
6 percent wind.

7 JUSTICE RANDOLPH: Who furnished the flood  
8 insurance proof of loss to them?

9 MR. COPELAND: I don't know that there is --  
10 there's not a proof of loss because the National Flood  
11 Insurance Program, due to the magnitude of Katrina, waived  
12 all proof of loss.

13 JUSTICE RANDOLPH: So there's no proof of loss?

14 MR. COPELAND: They may have -- they filed a  
15 claim and accepted and signed a check for \$350,000.

16 JUSTICE RANDOLPH: But if that's for -- if they  
17 had \$350,000 in flood losses, then they're entitled to it?

18 MR. COPELAND: Yes, certainly. I believe they  
19 were entitled to every penny of it.

20 JUSTICE RANDOLPH: And if they got \$350,000 more  
21 in wind loss, they would be entitled to that, if they can  
22 prove it.

23 MR. COPELAND: No, if we can't prove it. Let's  
24 keep the burden of proof, as the Court is correct, at me.  
25 It's our burden. We accept that burden.

1           What USAA believes should happen is that we should go  
2   to trial, and that this very jury instruction -- either  
3   you can take Judge Dodson's ruling, "The Corbans may not  
4   recover for any damage caused by water as defined in the  
5   policy or combination of that water or wind as proven by a  
6   preponderance of the evidence by USAA."

7           You can take that, or you can take it the way that  
8   Judge Senter wrote it that she comments on --

9           JUSTICE DICKINSON: But that doesn't go as far as  
10   you went a few minutes ago, Mr. Copeland.

11          A few minutes ago, there could be a combination of  
12   water and wind, and the damage would have occurred without  
13   either one of them.

14          But you're saying that you have to prove, in order to  
15   exclude the claim, the particular damage -- as I  
16   understood what you said a minute ago, you have got to  
17   prove that there was wind and water involved in this  
18   particular damage.

19          And you have got to prove that, had there been no  
20   water, there would have been no damage?

21          MR. COPELAND: But for.

22          JUSTICE DICKINSON: You have got to prove that?

23          MR. COPELAND: Yes.

24          JUSTICE DICKINSON: And if there's wind and water  
25   that causes a damage, and you can't prove that, you've got

1 to pay?

2 MR. COPELAND: If it's indeterminable, we pay; we  
3 didn't meet the burden of proof.

4 JUSTICE DICKINSON: Let me ask you one more  
5 question about the flood insurance payment that you want  
6 to offer proof on at the trial.

7 Do you agree that you should have to wait until the  
8 Plaintiffs offer evidence that -- or offer testimony, or  
9 offer an opinion that all of their damages were caused by  
10 wind, before you have the right to introduce the payment  
11 on the flood policy?

12 MR. COPELAND: No, your Honor. I believe that  
13 it's an admission against interest that there was some  
14 flood damage that occurred at that house.

15 JUSTICE DICKINSON: You don't think that's  
16 putting on rebuttal evidence before they've said anything  
17 to rebut at the trial? What if they never take that  
18 position at trial?

19 MR. COPELAND: Pardon?

20 JUSTICE DICKINSON: What if they never take that  
21 position at trial?

22 MR. COPELAND: Well, the problem is they've got  
23 an expert that's taken that position. So if they withdraw  
24 that expert --

25 JUSTICE DICKINSON: I'm including that. I'm

1 saying if their expert says it, or if they say it, that's  
2 one thing.

3 But are you asking that in opening statement right off  
4 the bat, you should be able to get up and tell the jury  
5 about the policy, before there's any evidence that they  
6 take the position that there was no flood or water damage?

7 MR. COPELAND: It is, as the Court says,  
8 rebuttal. It needs a predicate.

9 JUSTICE DICKINSON: You wait -- you have to wait  
10 until something contradictory comes into evidence before  
11 you can mention it?

12 MR. COPELAND: It needs a predicate, your Honor.

13 JUSTICE DICKINSON: Okay.

14 MR. COPELAND: We have to prove the predicate.

15 JUSTICE DICKINSON: Okay.

16 JUSTICE WALLER: Mr. Copeland, a little different  
17 -- Ms. Guice said that this is an all risk policy, all we  
18 have to do is put on a case to show that there was a loss,  
19 and we can rest. Do you agree with that?

20 MR. COPELAND: Yes, on the structure. It is an  
21 all risk policy on the structure. It is a named peril  
22 policy on the contents.

23 This Court has case after case that draw the  
24 distinction of who has the burden of proof.

25 JUSTICE WALLER: So she doesn't have to put on



1 any proof that it was wind damage?

2 MR. COPELAND: Not on the structure. None  
3 whatsoever. She proves that it was -- well, we admit that  
4 it's a direct physical loss.

5 There are three forces at work -- there are two forces  
6 at work. There's the flood storm surge, and there's wind.  
7 When they act separately, there's really no issue.  
8 Clearly the flood is excluded. Clearly the wind is  
9 included. It's the standard on burden of proof.

10 It's that one rare - excuse my levity - tooth on a  
11 chicken that comes up, but you cannot say -- all of us who  
12 have tried cases know that you need to instruct a jury  
13 fully.

14 What is the jury to do when they go back in the jury  
15 room, and they say, 'Well, maybe it was caused by both at  
16 the same time?' They need direction. They need  
17 direction. The policy sets that direction.

18 That, by what Ms. Guice said, was the purpose of this  
19 clause. It put that middle concurrent or synergistic or  
20 contributing cause but for; it put that one little piece  
21 of loss outside this policy because it went into it.

22 The insurance industry is not as insane as people  
23 think. It's all designed to fit like a glove. We don't  
24 want gaps, and we don't want people paying premiums twice  
25 for the same coverage.

1           This coverage was allocated to the National Flood  
2 Insurance policy. That's where you find that coverage for  
3 --

4           JUSTICE WALLER: Let me ask you this --

5           MR. COPELAND: -- flood or the combination.  
6 Pardon me.

7           JUSTICE WALLER: All right. You've already  
8 agreed that there's wind damage and that there's flood  
9 damage --

10          MR. COPELAND: Yes, sir.

11          JUSTICE WALLER: -- that precludes the payment.  
12 So is this an ACC case? Is it simply you can show there's  
13 wind, and the rest of it is flood, or do we have a  
14 concurrent damage issue?

15          MR. COPELAND: Every case where you want to  
16 instruct the jury fully is an ACC case. Every judge,  
17 trial judge, has to tell the jury what to do if in their  
18 wisdom, their duty, they go back and find that there was  
19 some synergistic loss.

20          You can't send them back there unknowing. You have to  
21 define for them what to do in each circumstance that they  
22 might be able to find.

23          And I've just been dealing with juries too long to not  
24 fully instruct them on the possibilities. And, plus, this  
25 is part -- as Judge Graves has said, and as Judge

1 Dickinson said in Knight versus USF&G, in Noxubee County  
2 School System versus United Insurance Company, this is  
3 part of the bargain. This was part of what the policy was  
4 written on. This is part of the way the policy was  
5 constructed.

6 It's there. It defines that middle point. It defines  
7 who has responsibility for it.

8 JUSTICE PIERCE: Mr. Copeland, so Ms. Guice took  
9 the position that we don't need to apply the ACC clause;  
10 you take the position we do. So that's one difference,  
11 correct?

12 And keeping that thought in mind, so it's your  
13 position that if - in your example earlier with the window  
14 with the PSI analogy - that the jury should not have the  
15 opportunity to assess what part of that damage was a  
16 result of wind and what part was the result of water, but  
17 if they both combined to create the loss, then therefore  
18 it's excluded. Is that what I'm hearing you say?

19 MR. COPELAND: Not exactly.

20 JUSTICE PIERCE: All right. Well, then --

21 MR. COPELAND: Your Honor, when we say, "Does the  
22 ACC clause apply," Ms. Guice talks about it like it was  
23 some great tool that we used not to pay claims that were  
24 due. That's simply not what we're doing.

25 The application and the use of the ACC clause comes up

1 in jury instructions. And in the cases I've tried, you've  
2 never heard one lawyer say to the jury one word about an  
3 anti-concurrent causation clause. You hear that in the  
4 chambers with the judge when you're drafting the  
5 instructions, and that's the only time it comes up.

6 I was asked for an example that I could come up with  
7 of when there would be a synergistic loss, that middle  
8 ground loss. And I gave you the example of the large  
9 window pane with the 100 PSI breaking point.

10 In that instance, but for the water, that glass would  
11 not have broken, and it's not covered. Now let's assume  
12 that that window pane was divided in two. And let's  
13 assume that the water knocked out the bottom, and the wind  
14 knocked out the top. Clearly that top half is broken.

15 Let's assume that it's a brick wall. And let's assume  
16 that the wind knocked down the top half of the brick wall,  
17 and the water knocked down the bottom. It's our  
18 obligation under the policy to rebuild the top half of  
19 that wall.

20 Where it can be separated, where it is divisible,  
21 where it can be parsed out, we pay. Where you simply  
22 cannot separate it because it took a combined force to  
23 cause any damage or loss, it is controlled by the ACC  
24 clause.

25 JUSTICE WALLER: Do you agree with Judge Senter's

1 opinion on reconsideration in Dickinson?

2 MR. COPELAND: Oh, completely. 100 percent.  
3 Judge Senter has it exactly right. And what he said is  
4 exactly what Judge Dodson said. You can lay the two  
5 sentences side by side.

6 JUSTICE WALLER: Other questions?

7 JUSTICE DICKINSON: Let me ask, Mr. Copeland,  
8 back on the flood insurance papers --

9 MR. COPELAND: Yes, sir.

10 JUSTICE DICKINSON: -- which the Corbans  
11 received, now as I understand it from what we have before  
12 us, Judge Dodson has ruled that that evidence of receipt  
13 of flood insurance payments is admissible under 801(d)(2).

14 MR. COPELAND: Yes, your Honor.

15 JUSTICE DICKINSON: Okay. Now did she apply a 403  
16 balancing test?

17 MR. COPELAND: She did, and she found that it --  
18 ruled in favor of admissibility. She ruled, quoting from  
19 her Order, on page nine of that Order, record excerpt page  
20 63, "They have admitted that those flood damages existed  
21 and thereby admitted that those flood damages are excluded  
22 from coverage under the subject policy. Such an admission  
23 is permitted in evidence at trial. Also admissible is the  
24 Corbans' explanation of the facts surrounding that  
25 admission."

1 Now, what she said is typical in admission against  
2 interest, the party against whom it's being proffered has  
3 the opportunity to explain it.

4 She did go through the 403 prejudicial balancing test  
5 and found that, in this case, that it would not be  
6 appropriate. She said, "Certainly it weighs against them;  
7 it is because it's probative."

8 JUSTICE DICKINSON: But you agree it's only  
9 admissible if it becomes relevant because of something  
10 that happens at trial?

11 MR. COPELAND: It's only admissible if we lay the  
12 proper evidentiary predicate.

13 And I know that you and I are using two different  
14 words; certainly one of the one that you said is a proper  
15 evidentiary predicate.

16 JUSTICE WALLER: Any other questions?

17 (No response.)

18 JUSTICE WALLER: Thank you, Mr. Copeland.

19 MR. COPELAND: Thank you, your Honor.

20 JUSTICE WALLER: We will hear from Nationwide.

21 MR. LANDAU: If it please the Court, my name is  
22 Christopher Landau, and I'm counsel for Nationwide. I'm  
23 with Kirkland and Ellis in Washington, D.C., and we've  
24 been working on these Katrina litigation cases now for  
25 several years, alongside Mitchell Cowan from the Watkins

1 Ludlam Firm, and I'm proud to be here with Micky today.

2 I would like to say at the outset that we're very  
3 grateful to the Court for taking what we understand is the  
4 unusual step of allowing amicus curiae to argue, to  
5 participate in this oral argument, as the anti-concurrent  
6 causation clause at issue here is similar to the clause in  
7 our policy, and as I think you have recognized, there are  
8 certainly some differences, at least in the application of  
9 the clause by USAA from the way that we interpret the  
10 clause.

11 I'm not sure --

12 JUSTICE WALLER: Mr. Landau, let me ask you about  
13 that. As I understand it, USAA takes the position on the  
14 ACC, and you take a slightly different position. Does  
15 that not in and of itself make the clause ambiguous?

16 MR. LANDAU: Your Honor, it does not. I think  
17 this Court has stated in the Delta Pride Catfish case and  
18 the Wooten case that there are situations where parties  
19 disagree about the meaning of something, where judges  
20 disagree about whether something is clear, and those type  
21 things don't create an ambiguity.

22 I'm not sure, frankly, from reading the brief of USAA,  
23 that they necessarily disagree with us on the  
24 interpretation of the clause. I think what Mr. Copeland  
25 was really talking about is the way USAA applies the

1 clause in practice.

2 And I thought it was very interesting, frankly, that  
3 he was very candid and forthright in saying, "We don't  
4 care about the sequence." Well, you know, the clause has  
5 the words "in any sequence" in it.

6 And, in fact, I'm not sure - to go back to a point  
7 that Justice Dickinson raised a few minutes ago - that  
8 there really is any difference between the position that  
9 USAA is taking in this Court and the position that the  
10 Plaintiffs are taking because the Plaintiffs concede at  
11 page 20 of their reply brief that, "The ACC operates to  
12 exclude loss" - and I'm quoting here from that page -  
13 "which the carriers can prove was caused by water, even  
14 water caused by wind."

15 I think in Mr. Copeland's hypo of the synergistic  
16 combination, the water as a but for cause is -- if the  
17 water is a but for cause, it seems to me they're saying  
18 the same thing in terms of -- to the extent that their  
19 position is that it's got to be synergistic.

20 Again, I'm not sure that it's necessarily clear that  
21 that is something -- going back to Mr. Chief Justice, your  
22 question -- that is something that USAA says is compelled  
23 by the language of the policy versus the business decision  
24 that they've made to apply it in a --

25 JUSTICE PIERCE: Mr. Landau, in an example where



1     you have wind take the roof off, and you have rain come in  
2     and you have rain damage, then you have a surge come in  
3     and destroy the furniture and everything else in the home  
4     or the structure itself, now your position is that you  
5     shouldn't pay for anything regarding the carpet or  
6     anything like that. Is that -- that's different from  
7     USAA, right?

8             MR. LANDAU: That's correct, your Honor. Again,  
9     I'm not sure if USAA is saying that that's their  
10    application or their interpretation. But going back to  
11    answer your question specifically, the answer is yes. We  
12    have the burden.

13            I think that's one thing on which everyone before you  
14    today agrees; that the insurer has the burden of showing  
15    that an exclusion to coverage - which the anti-concurrent  
16    causation clause is part of the exclusion - that if we  
17    carry the burden of showing that the excluded clause, like  
18    water in your hypothetical, was sufficient to cause the  
19    loss, then you don't get into the sequencing of the  
20    causation. In other words --

21            JUSTICE PIERCE: But in an example -- in this  
22    example, once the rain has come in and damaged the  
23    property, the claim vests then; does it not? Then you  
24    don't get the benefit of the surge coming in to wipe away  
25    a claim that had been previously vested, do you?

1 MR. LANDAU: Your Honor, I think that is exactly  
2 the ground zero question here, which is the position that  
3 Judge Senter has taken in Dickinson is -- and this is  
4 different than what the Fifth Circuit said in Leonard and  
5 in the Bilby case, where it says this most clearly, is  
6 that you don't slice and dice.

7 When it says cause in any sequence, the point is that  
8 you can't start saying that the sequencing is dispositive  
9 of the causation.

10 You can't say, 'Ah-ha. I can come in, even where it's  
11 clear that the water was sufficient to cause the loss,'  
12 and that's unconceded, as it often is in these cases, I  
13 come in and say, 'Well, guess what, in the minutes before  
14 the storm surge came through and destroyed everything, a  
15 window was broken by a flying branch.'

16 Our point is that "in any sequence" language was put  
17 in there to avoid precisely these kind of disputes over  
18 sequencing that had bedeviled courts going back to the  
19 Camille cases.

20 JUSTICE DICKINSON: Where did you get the term  
21 "sufficient?" You used the terminology "where there was  
22 some damage, and then the water comes along with force  
23 sufficient to have caused it." That's not in the policy  
24 anywhere, is it?

25 MR. LANDAU: Well, your Honor. What is in the

1 policy is "cause in any sequence." And the question is:  
2 What does it mean to be caused in any sequence?

3 What we respectfully submit is that you cannot say --  
4 that you cannot say that the sequencing is dispositive of  
5 the causation issue. You can't slice and dice.

6 JUSTICE DICKINSON: But it might be. I mean,  
7 suppose you had a pole in front of a house holding up a  
8 balcony. And suppose the wind came along and cracked the  
9 pole. You've got a loss?

10 MR. LANDAU: Well, your Honor --

11 JUSTICE DICKINSON: I mean, is there a loss? Is  
12 there a covered loss?

13 MR. LANDAU: You don't know that until the end of  
14 the event, your Honor.

15 JUSTICE DICKINSON: What if we did?

16 MR. LANDAU: Okay, let's --

17 JUSTICE DICKINSON: What if the Plaintiff proves  
18 it to the satisfaction of the jury?

19 MR. LANDAU: Let me just say one thing, your  
20 Honor. The problem is you don't know in these cases.

21 I mean, I think as Ms. Guice said - that's another  
22 thing we can agree on - that these clauses were adopted  
23 precisely because it proves so difficult in these cases to  
24 figure out what came first, the wind or the water.

25 That's why they said "in any sequence." And I don't

1 think you have heard from either of the parties that have  
2 spoken before me this morning any answer to what does the  
3 "in any sequence" language do there. What does it -- In  
4 other words, they're just looking at the word "cause."

5 As I understand it, where Judge Senter came at it in  
6 the Dickinson case --

7 JUSTICE DICKINSON: Mr. Landau, suppose the pole  
8 got cracked, and suppose somebody saw that happen. And  
9 there's a cracked pole, and 20 minutes later the flood  
10 knocks the house down and washes it away. Do you have to  
11 pay the claim for the pole, the \$300 pole?

12 MR. LANDAU: No, your Honor, because the water --  
13 if we can prove it, and we have the burden, your Honor, to  
14 show that the water was sufficient to cause the loss, if  
15 we can carry that burden of showing that it was, they  
16 cannot get around that by saying, 'Well, here's' -- I  
17 mean, this is what happens --

18 JUSTICE DICKINSON: Wait a minute, Mr. Landau.  
19 You're running off on it, Mr. Landau. I understand what  
20 you're saying.

21 But where you're losing me is, if the wind by itself,  
22 no water, not even raining, but you've just got a hard  
23 wind, and it cracks the pole, no water caused that loss.  
24 That pole cracked because the wind cracked it. Just a  
25 minute.

1           The pole cracked because the wind cracked it. And 30  
2 minutes later, the wind picks up some more, and then here  
3 comes the surge, and it washes the house away.

4           What is it about the cracked pole that you say the  
5 water contributed to?

6           MR. LANDAU: It's the "in any sequence" language,  
7 your Honor.

8           You can't determine -- with all respect, your Honor,  
9 in your hypothetical, you are saying that the sequencing  
10 is determinative of causation. You are saying where the  
11 loss was caused by the wind before the water got there,  
12 that's the end of the story, right?

13          And that would be fine, if all it says is loss is  
14 caused by wind. What the policy says, though, is "in any  
15 sequence." And I think --

16          JUSTICE DICKINSON: This has more than the words  
17 "in any sequence" in it. There's more to it than that.

18          MR. LANDAU: Oh, right. But what does it mean --  
19 I think this is where the Fifth Circuit -- what the Fifth  
20 Circuit has recognized in these cases is that with the  
21 sequence that you have three categories.

22          You have losses caused exclusively by wind,  
23 exclusively by water, and losses caused concurrently or in  
24 any sequence.

25          Again, if we carry our burden of showing that it was

1 caused in any sequence --

2 JUSTICE DICKINSON: What about the example  
3 Justice Randolph brought up a minute ago about the  
4 hurricane that came through and blew the roof off and  
5 caused some damage, and went away and went out onto the  
6 east side of Florida, and then came across Florida, and  
7 then came back into the Gulf and hit us again, and blew  
8 the house away?

9 Are you saying that that sequence would prevent the  
10 homeowner from recovering any loss, even though they might  
11 have already been repairing the roof?

12 MR. LANDAU: Your Honor, that as I understand it  
13 is a somewhat freakish event where you have a single  
14 hurricane that comes around. I mean, it is our position,  
15 yes, if that is the single event.

16 I mean, it's totally different if there are two  
17 different events.

18 JUSTICE DICKINSON: Same hurricane.

19 MR. LANDAU: If it's the same hurricane, you  
20 can't decide the causation issue until the end of the  
21 event. And then you don't look at the sequencing of the  
22 loss. That is the basic point.

23 JUSTICE RANDOLPH: Let me interrupt just a little  
24 bit. You want to call the event "the hurricane?"

25 MR. LANDAU: Yes, your Honor.

1 JUSTICE RANDOLPH: But there's no hurricane  
2 coverage. We're talking about wind losses and water  
3 losses; not hurricane losses?

4 MR. LANDAU: Correct. We're talking about  
5 losses.

6 JUSTICE RANDOLPH: Well, I think that's where the  
7 Fifth Circuit got off wrong and where you're getting off  
8 wrong, so let's walk through it.

9 MR. LANDAU: Sure.

10 JUSTICE RANDOLPH: A little different thing than  
11 what Mr. Dickinson says.

12 If wind blows in my house and throws a couch up  
13 against the wall and breaks it in half, have I suffered a  
14 loss?

15 MR. LANDAU: Your Honor, you cannot --

16 JUSTICE RANDOLPH: Have I suffered a loss? Have  
17 I suffered a loss when the couch gets broken in half?

18 MR. LANDAU: Your Honor --

19 JUSTICE RANDOLPH: You're not answering my  
20 question.

21 MR. LANDAU: I'm about to, your Honor. I'm  
22 sorry. The point is you cannot determine the sequencing  
23 of the loss until the event is over. So --

24 JUSTICE RANDOLPH: Until the hurricane is over?

25 MR. LANDAU: Yes.

1 JUSTICE RANDOLPH: Does it say anywhere in the  
2 policy until the hurricane is over --

3 MR. LANDAU: That's what it means, your Honor,  
4 when it says the sequencing --

5 JUSTICE RANDOLPH: Now, does it say so in the  
6 policy?

7 MR. LANDAU: Yes, sir. It says "in any  
8 sequence." We respectfully submit --

9 JUSTICE RANDOLPH: Well, let me finish the  
10 sequencing because I think you're getting damage and loss  
11 confused, okay?

12 If I take my car out there and roll it over three  
13 times, and it's totaled, okay, so I've got a total loss --

14 MR. LANDAU: Right.

15 JUSTICE RANDOLPH: Loss is determined, actual  
16 cash value, at time of loss. Can we agree on that?

17 MR. LANDAU: Your Honor --

18 JUSTICE RANDOLPH: Can we agree on that? Does  
19 the policy -- do I need to pull the policy out, or will  
20 you agree to it?

21 MR. LANDAU: The only point I will make is, when  
22 it says "cause in any sequence" that you can't --

23 JUSTICE RANDOLPH: I'm not asking you that. I'm  
24 asking you when is the value of the loss determined.

25 MR. LANDAU: When the event is over that is



1 causing the loss.

2 JUSTICE RANDOLPH: When the hurricane -- in your  
3 opinion, it's when the hurricane is over?

4 MR. LANDAU: Yes. Yes.

5 JUSTICE RANDOLPH: Okay.

6 MR. LANDAU: And then you give me -- in other  
7 words, that's the whole point of these clauses, your  
8 Honor.

9 With respect, whether one thinks they're a good idea  
10 or a bad idea, these clauses were adopted precisely in the  
11 wake of the Hurricane Camille cases, which adopted the  
12 sufficient proximate cause doctrine that created a thicket  
13 of --

14 JUSTICE WALLER: Mr. Landau?

15 MR. LANDAU: Yes, sir?

16 JUSTICE WALLER: Do you agree -- Nationwide was a  
17 party to the Dickinson case. Do you agree with Judge  
18 Senter's ruling in that?

19 MR. LANDAU: No, your Honor. We respectfully do  
20 not. We think it's inconsistent with the Leonard case and  
21 the Bilby case and the Tuepker case from the Fifth  
22 Circuit.

23 JUSTICE WALLER: Would your company have paid the  
24 same losses that USAA has voluntarily paid in the Corban  
25 case?

1 MR. LANDAU: Our company has --

2 JUSTICE WALLER: On wind damage? On wind damage?

3 MR. LANDAU: Your Honor, our company would not  
4 feel compelled by the clause by the plain language to pay.

5 JUSTICE WALLER: So you wouldn't?

6 MR. LANDAU: Our position is that we are not  
7 required to pay those losses. Sometimes, where we believe  
8 that you can really show that these pure wind losses are  
9 covered, then we'll pay wind losses.

10 But we certainly don't believe that the Plaintiffs can  
11 be free to go out and get whatever expert they want and  
12 get to a jury on these kind of issues, where we carry our  
13 burden of showing that, regardless of the sequencing, the  
14 water was sufficient to cause the loss. Because we  
15 believe that that's why these clauses -- that's the whole  
16 point of the clause.

17 You wouldn't need these clauses if we were basically  
18 back in the efficient proximate cause days of the  
19 Hurricane Camille cases.

20 I mean, again, I think the point is these were adopted  
21 for a reason. I don't believe that the interpretation  
22 that you have heard, either from Ms. Guice or from  
23 Mr. Copeland, really adds anything to what the preexisting  
24 law would have been. You're still in the morass of  
25 sequencing.

1 JUSTICE PIERCE: So you're sequencing, if 95  
2 percent of the home was destroyed, and then we have the  
3 event of the storm surge, then you would not pay a dime?

4 MR. LANDAU: Your Honor, if we prove that the  
5 storm surge was sufficient to cause -- we have that  
6 burden, again, and that is absolutely crystal clear.

7 If we can prove that the storm surge was sufficient to  
8 cause all of this, it is no answer then to say, 'Yeah, but  
9 I'm going to show it -- I'm going to have somebody come in  
10 and say, "Look, guess what, the window was broken before  
11 the storm surge came and then wiped away the whole  
12 house.'" "

13 But you don't get into those kinds of issues precisely  
14 because of the sequencing of the damage.

15 JUSTICE PIERCE: So you wouldn't pay a dime?

16 MR. LANDAU: If -- again, we wouldn't pay a dime  
17 for things where we can carry our burden, which is right  
18 there in the policy, of showing that the loss was caused  
19 concurrently --

20 JUSTICE PIERCE: I'm giving you -- the example is  
21 95 percent of the home is destroyed, the flood comes in  
22 and gets the other five percent, and you know that.

23 Does your interpretation of the word "sequence" mean  
24 you pay zero?

25 MR. LANDAU: Yes, your Honor.

1 JUSTICE PIERCE: Thank you.

2 MR. LANDAU: Again, but the point is we are  
3 paying only where we have proven. There's no unfairness  
4 in this because we always have the burden of showing that.

5 And, again, it is rare that you will have a situation,  
6 your Honor, where you can say with absolute certainty that  
7 95 percent of the damage was already caused by wind.

8 The problem is, and I think the Plaintiffs are very  
9 candid about this, you don't know in these cases. And  
10 there are, you know --

11 JUSTICE WALLER: I thought there were experts  
12 that testified that you could tell the difference between  
13 wind damage and water damage.

14 MR. LANDAU: Well, your Honor, this is -- it is  
15 proven to be an area of intractable difficulty of proving  
16 which one got there first.

17 JUSTICE WALLER: Is that what juries are for, to  
18 make factual determinations?

19 MR. LANDAU: Well, your Honor, again, if we  
20 didn't have the clause, that's where this Court was in the  
21 Hurricane Camille cases.

22 And going back I think that's a point that Justice  
23 Dickinson had made early on; can a jury just make that  
24 determination as to did the wind or water get there first.  
25 And if we had not put an anti-concurrent causation clause

1 in, that's presumably where we would be.

2 The reason -- I mean, I think the issue that comes up  
3 is what on earth was the point of this clause. What is  
4 this achieving over and above where you would have been  
5 anyway under default common law rules?

6 JUSTICE WALLER: Mr. Landau, you're out of time.  
7 Are there any further questions?

8 (No response.)

9 JUSTICE WALLER: Thank you, sir.

10 MR. LANDAU: I thank the Court.

11 JUSTICE WALLER: Mr. General?

12 MR. HOOD: May it please the Court, we're honored  
13 as the State of Mississippi to be here today present  
14 before the Court. And I appreciate the Court extending us  
15 the extraordinary courtesy of allowing us to argue as  
16 amicus in this particular case.

17 On the Saturday after the storm hit, I went down to  
18 Jackson County, and I met with the sheriff down in Jackson  
19 County, Mike Byrd. We had satellite phones. We had cell  
20 phones. We had clothing for his officers.

21 And I asked him, "What do you need," and the first  
22 thing his response was, "Do something about these  
23 insurance companies."

24 At that point on Saturday, they had already been down  
25 and found where there was water -- a water line that the

1 insurance companies were refusing to pay. That was on the  
2 Saturday, after the storm hit on Monday.

3 That's when I knew that we had a major problem, a  
4 matter of statewide interest to address. I came back to  
5 our office here in our old building out front and  
6 assembled a team of gray-haired lawyers, some of who are  
7 here today - some have hair; some don't.

8 But we sat around the table to discuss what the law  
9 was in the State of Mississippi, so that we could get a  
10 quick decision.

11 We had some of our learned staff, two young ladies in  
12 our office, went to the archives and looked at every  
13 single case, every Camille case, did a thorough study of  
14 the briefs, and we arrived at the decision that we needed  
15 to file something here in Hinds County, rather than down  
16 on the Coast, to try to reach a quick decision on what the  
17 application of the wind and water clause was, and what the  
18 validity of the anti-concurrent cause provision was, so  
19 that we would have a quick decision to get up before you.

20 And I'm not here today, unfortunately, to bring that  
21 case. It's still tied up in the lower Court. It has been  
22 split, two in Hinds County, two in Rankin County.

23 JUSTICE DICKINSON: Can I ask you a quick  
24 question?

25 MR. HOOD: Yes, sir.

1 JUSTICE DICKINSON: Is there anything about  
2 Mr. Copeland's argument that you disagree with?

3 MR. HOOD: Mr. Copeland I think takes a different  
4 position than most of the other companies we've had to  
5 deal with. I don't know that his policy is a whole lot  
6 different; that's just his position.

7 However, what I would ask the Court to allow me to do  
8 today is to allow Danny Cupit, one of those lawyers that  
9 came to our office, and actually who hired a former law  
10 clerk who worked for us and did the research, and he  
11 thought she was so great, he took her to work with him, so  
12 I said, "Well, why don't you all do the brief in this case  
13 and make the argument."

14 So I would ask the Court to allow Danny Cupit to come  
15 before you to make the argument on behalf of the State of  
16 Mississippi.

17 JUSTICE DICKINSON: You're saying he would answer  
18 that question I asked?

19 MR. HOOD: Yes, sir.

20 JUSTICE DICKINSON: Okay.

21 MR. HOOD: Thank you.

22 MR. CUPIT: May it please the Court, the answer  
23 is no.

24 But I think listening to the arguments of the  
25 Nationwide Counsel, you understand now the problem that

1 we're having and the reason the Attorney General's office  
2 asked for leave to file an amicus in this case.

3 Each insurance company is interpreting its individual  
4 policy individually. And listening to the arguments of  
5 Nationwide, I'm reminded of the conversation in the  
6 children's book by Louis Carroll, "Through the Looking  
7 Glass," when Alice asked Humpty Dumpty if words mean  
8 different things. And Humpty Dumpty said, "When I use a  
9 word, it means just what I want it to mean; nothing more,  
10 nothing less."

11 That's the problem that policy holders are confronting  
12 on the Coast is that there is different language in every  
13 policy that's different.

14 Now, I came here today actually to address the public  
15 policy argument about why those clauses should not be  
16 allowed to prevail over State law. But I would like to  
17 address some of the questions the Court raised earlier,  
18 and see if we can at least narrow the issue.

19 First point is separate independent causes cannot  
20 cause indivisible injury, nor can it cause sequential  
21 injury, since by definition independent forces cause  
22 separate damage.

23 JUSTICE CHANDLER: Mr. Cupit?

24 MR. CUPIT: Yes, sir?

25 JUSTICE CHANDLER: Let me ask you now, can



1 independent forces concurrently result in synergistic  
2 force?

3 MR. CUPIT: No. And the example that Greg gave I  
4 think highlights that question. But the truth is it  
5 doesn't matter because you've got wind blowing against the  
6 glass, I believe the patio glass that he referred to, that  
7 was not enough to cause loss.

8 Then you've got water blowing up against it that  
9 independently was not enough to cause loss. It's only  
10 when both of them combined would cause some sort of loss  
11 by the combined forces breaking that.

12 Now, theoretically, it's inconceivable that that  
13 concept could happen. But whether it can or not, it  
14 doesn't alter the burden of proof.

15 The carrier, the insurance company, to assert that it  
16 was the combined force of wind and water still has to  
17 prove, to get the exclusion, that it was a loss caused by  
18 water. And they would have to have expert testimony or  
19 some other evidence that it was the combined forces that  
20 caused that glass to break.

21 So whether or not in some theory those two forces  
22 could combine to cause an indivisible injury does not  
23 alter the fact that it's only that portion of that broken  
24 window pane that is caused by water that there can be a  
25 recovery.

1           And the burden still is on the insurer to make that  
2 point.

3           JUSTICE CHANDLER: So what you're saying is the  
4 combined forces, if they do create a synergistic force  
5 which damages the window resulting in a loss, the  
6 homeowner recovers because the water alone would not have  
7 damaged the window?

8           MR. CUPIT: What I'm saying -- you can't answer  
9 that yes. What I'm saying is the burden is on the insurer  
10 to establish that those combined forces caused the loss.

11           JUSTICE DICKINSON: Why is that different? I  
12 began with the question: What do you disagree with that  
13 Mr. Copeland said? And he said exactly that. He said it  
14 may be a difficult thing to do, maybe impossible, but that  
15 is the insurance company's burden.

16           And I hear you saying it's a pretty difficult burden,  
17 and they're not going to be able to do it. And if that's  
18 so, so be it. But what do you disagree with that he's  
19 saying?

20           MR. CUPIT: Well, that's what I said earlier; I  
21 don't disagree with him.

22           JUSTICE DICKINSON: I apologize. I thought I  
23 understood you to say that you disagreed with what he  
24 said.

25           MR. CUPIT: No. The point is that we do not

1 disagree with Mr. Copeland's discussion on that issue.

2 JUSTICE DICKINSON: Okay.

3 MR. CUPIT: The problem is that each insurance  
4 company, as you saw from the Nationwide discussion, has a  
5 different approach.

6 But the answer to that question, and I may not have  
7 been clear, is we do not disagree with that  
8 interpretation.

9 JUSTICE DICKINSON: Okay.

10 MR. CUPIT: In fact, that's consistent with the  
11 rule in Mississippi on proximate causation and  
12 apportionment.

13 And the second point I would like to make before I get  
14 to the public policy argument, for whatever it's worth  
15 now, is that the loss attaches at the time the cause  
16 occurs.

17 And somebody raised the issue of the telephone pole,  
18 and I believe it was Justice Dickinson, that the loss  
19 there attached at the time the wind blew the pole down.  
20 You can't have that more than once.

21 You can have it masked or covered up by subsequent  
22 wind damage or storm surge, but the loss attaches at the  
23 physical time it causes the loss -- or the cause -- the  
24 loss attaches at the time the cause caused the loss.

25 Now, the rule in Mississippi -- and Leonard and

1 Tuepker acknowledged this up to a point. But the rule in  
2 Mississippi holds that, where there is a loss caused by a  
3 combination of both covered and uncovered perils, the loss  
4 is covered, notwithstanding the fact that part of the  
5 loss was caused by an excluded peril.

6 But that's only half the story, and that's the only  
7 half that Leonard addressed. Under the Court's decision  
8 in Glens Falls versus Linwood, the insurer is entitled to  
9 have the excluded cause apportioned, if it can prove what  
10 portion of the loss was caused by the excluded peril. And  
11 that's where we again agree with Mr. Copeland.

12 It's only when it fails in that burden of proof that  
13 the entire loss is allocated to the efficient proximate  
14 cause, in this case, wind or water, depending on what the  
15 jury decides.

16 JUSTICE RANDOLPH: Excuse me. In Glens Falls,  
17 though, what you had -- the property damage was burnt  
18 beans, if I recall right, burnt soybeans.

19 MR. CUPIT: I didn't hear the first part.

20 JUSTICE RANDOLPH: I said Glens Falls dealt with  
21 burnt soybeans.

22 MR. CUPIT: Yes, sir.

23 JUSTICE RANDOLPH: The question was whether there  
24 was bin burned or whether there was a fire. But just  
25 looking at the beans, you couldn't tell what caused the

1 beans to be burned -- just looking at the beans.

2 But in this case, as I understand it, whether you take  
3 USAA's factual position or the Plaintiff's, the damages  
4 are distinguishable. We don't just have burnt beans.

5 We have loss, according to USAA, 12 feet high on the  
6 ceiling in a circular pattern. And according to Biddy,  
7 all this was caused after it all went out by wind.

8 So it's just a classical jury issue that makes it  
9 rather unique. And, of course, in Glens Falls, we didn't  
10 have an anti-concurrent clause either. So I don't know if  
11 that's a case that we want to look back on regarding  
12 causation because in this case you've got witnesses.

13 You've got eyewitnesses to damage, who all say that  
14 the damage can be distinguished, which sort of takes away  
15 from the Leonard-type approach where they talk about  
16 indivisible damage, which we don't have in this case, as I  
17 understand it.

18 MR. CUPIT: The problem occurs, and it still goes  
19 back to the burden of proof. And the fundamental argument  
20 that we want to make is that the Court should consistently  
21 follow its rules on proximate cause to allow the jury to  
22 make that determination.

23 JUSTICE RANDOLPH: But it's not the proximate --  
24 in this case, as I understand and USAA already agreed to,  
25 and they need to tell all of us if it's different than

1 that, once the Plaintiff shows direct physical loss, the  
2 burden has shifted to the Defendant to prove the  
3 exclusion.

4 MR. CUPIT: That's right, your Honor.

5 JUSTICE RANDOLPH: So I don't think we need to  
6 talk about burden of proof anymore. I think everybody is  
7 in agreement.

8 MR. CUPIT: The problem occurs where there's a  
9 slab and where there are no witnesses.

10 JUSTICE RANDOLPH: But this is not a slab case.

11 MR. CUPIT: Right.

12 JUSTICE RANDOLPH: Okay.

13 MR. CUPIT: We're here to argue all the  
14 interpretations by the insurance companies, which is the  
15 problem.

16 JUSTICE DICKINSON: Why is that different? Why  
17 is it different if it's a slab? Why doesn't the insurance  
18 company still have the burden to show what's excluded and  
19 what isn't? What's the difference in that kind of case?

20 MR. CUPIT: It doesn't change the burden of  
21 proof. That's where I was going with that point is that  
22 it's the same burden of proof. And if the insurer fails  
23 in that burden, then it's a covered loss because it's an  
24 all perils policy.

25 JUSTICE DICKINSON: Which is the position

1 Mr. Copeland takes in this case.

2 MR. CUPIT: I hope it's the position that he  
3 takes, and I hope it's the position that this Court takes.  
4 It's the honest --

5 JUSTICE RANDOLPH: So you say the fault of the  
6 Fifth Circuit's analysis of the slab cases, as I study  
7 those, there was a presumption that the water washed away  
8 the dwelling without any factual finding. For all I know,  
9 it blew away, and then the water washed away the debris.

10 But they presumed that the water washed away, in order  
11 to make the findings they did?

12 MR. CUPIT: Not only did they presume that, they  
13 want to -- and so does Nationwide want to exclude that  
14 from the jury's consideration.

15 They want an adjudication that, if you can't tell,  
16 then it defaults to the excluded peril. That's the rub  
17 here.

18 Under existing law, if the insurer fails -- insurer  
19 fails in its burden of proof, then the default goes to the  
20 policyholder because they haven't proven the excluded  
21 loss.

22 JUSTICE RANDOLPH: Let me ask you a question  
23 about -- how do you pronounce that name Tu --

24 MR. CUPIT: I mispronounce it.

25 JUSTICE RANDOLPH: Well, the State Farm case down

1 there. As I understood this decision by Judge Garwood in  
2 507 Fed Third 346, that they made this determination on a  
3 12(b)(6) motion; that there was a 12(b)(6) motion filed in  
4 the District Court, and then they decided which cases were  
5 covered by the policy or not when it went up on  
6 interlocutory appeal. Did I understand that correctly?

7 MR. CUPIT: Yes, sir. That's my understanding.  
8 And by the same token, summary judgment.

9 JUSTICE RANDOLPH: And that was a slab case?

10 MR. CUPIT: Right. And the point --

11 JUSTICE RANDOLPH: I don't think there was a  
12 summary judgment in the case.

13 MR. CUPIT: No, I'm saying here is on summary  
14 judgment.

15 And the point is that it is an issue for the jury to  
16 determine based on the appropriate assumptions of the  
17 burden of proof, which Mr. Copeland has agreed to assume.

18 JUSTICE WALLER: Mr. Cupit, you are out of time.  
19 Any further questions?

20 (No response.)

21 MR. CUPIT: Thank you, your Honor.

22 JUSTICE WALLER: Thank you. The procedure that  
23 we're going to follow is at this time we're going to take  
24 a 15 minute break. So the Court will resume at  
25 approximately 3:15. The Court will now stand in recess.



1 BAILIFF: All rise.

2 (Whereupon, a short recess was taken.)

3 BAILIFF: All rise. Oh, yea. Oh, yea. The  
4 Supreme Court of Mississippi is now in session. Chief  
5 Justice William L. Waller, JR., now presiding.

6 JUSTICE WALLER: Please be seated. Mr. Copeland?  
7 Mr. Copeland, I know everybody wants to be your friend  
8 today.

9 MR. COPELAND: It's rare, but it's appreciated.

10 I want to go back briefly after this discussion and  
11 repeat to the Court what USAA seeks in this case.

12 USAA asks this Court to affirm Judge Dodson's ruling,  
13 where she is setting up what the issues are going to be  
14 once the jury -- how you instruct the jury. And she  
15 ruled, "The Corbans may not recover for any damage caused  
16 by water as defined in the policy," which I would take to  
17 be storm surge, "or a combination of that water and  
18 wind."

19 So there are two forces acting - wind and water.  
20 There are three possibilities - all wind, all water, or  
21 this that we've referred to as synergistic or the  
22 combination.

23 JUSTICE DICKINSON: I thought I understood you  
24 till now. You backed up on me, Mr. Copeland.

25 MR. COPELAND: Let me do it again.

1 JUSTICE DICKINSON: Shouldn't her ruling be  
2 amended to the extent of what you stated earlier; that is  
3 that, where there's a combination in those cases where the  
4 Defendant can prove that absent -- because there will be  
5 cases where there is a combination where you can't prove  
6 that absent water, the damage wouldn't have occurred,  
7 right?

8 MR. COPELAND: Yes, your Honor. Perhaps back to  
9 page 282 of the record and the instruction from Judge  
10 Senter, "USAA has the burden of proving by a preponderance  
11 of evidence what portion of the Plaintiff's windstorm  
12 losses were caused or contributed to by storm surge  
13 flooding. And to the extent that USAA meets its burden of  
14 proof, it does not owe the Plaintiffs policy benefits for  
15 the losses caused or contributed to by storm surge  
16 flooding."

17 That is what Judge Dodson said. That is the  
18 instruction Judge Senter gave in Aiken. And that is  
19 exactly what Judge Senter is saying in what I call  
20 Dickinson Two, which is his reconsidered opinion in the  
21 Dickinson versus Nationwide.

22 JUSTICE RANDOLPH: What paragraph are you reading  
23 from on that?

24 MR. COPELAND: In the Dickinson opinion?

25 JUSTICE RANDOLPH: No, no, in the instruction you

1 just read.

2 MR. COPELAND: The instruction comes from --

3 JUSTICE RANDOLPH: The instruction on 282.

4 MR. COPELAND: That's the second paragraph.

5 JUSTICE RANDOLPH: I've got it in front of me; I  
6 just want to know which paragraph.

7 MR. COPELAND: The Dickinson case --

8 JUSTICE RANDOLPH: I've got a question for you on  
9 that.

10 MR. COPELAND: Oh, I apologize. I thought you  
11 were --

12 JUSTICE RANDOLPH: Which paragraph are you  
13 reading from on page 282?

14 MR. COPELAND: Two. The second paragraph.

15 JUSTICE RANDOLPH: Now, in paragraph two, it  
16 talks about losses caused or contributed to, okay?

17 MR. COPELAND: Yes, sir.

18 JUSTICE RANDOLPH: And then down at the fifth  
19 paragraph, it talks about damage caused or contributed  
20 to.

21 MR. COPELAND: Yes, sir.

22 JUSTICE RANDOLPH: Now, neither one of those  
23 terms are defined in the policy. Are those to be used as  
24 synonyms?

25 MR. COPELAND: Your Honor, I believe like any

1 other policy, they're to be used in their common sense  
2 forms. And at times, the word "loss" and the word  
3 "damage" are used as synonyms.

4 Earlier the Court pointed out that loss can be defined  
5 in the insurance policy as how much benefit you should be  
6 paid, how much money, resulting from damage. Loss, how  
7 much I'm out, how much I've lost, results from damage.

8 But in common vernacular, they're treated the same as  
9 synonyms.

10 JUSTICE RANDOLPH: Well, go back to I've turned  
11 my car over three or four times, and it's flat, and it's  
12 totaled. And then a wrecker comes out there to pick it  
13 up, and I've got a total loss. So there's nothing else to  
14 insure; we know what the loss is.

15 MR. COPELAND: Yes.

16 JUSTICE RANDOLPH: We'll say it's a \$10,000 car.  
17 If he backs the wrecker into my car, he causes me  
18 additional damage, but I suffer no additional loss.

19 MR. COPELAND: I agree totally.

20 JUSTICE RANDOLPH: So if we go back to the  
21 question that Nationwide refused to answer, that if you  
22 get a sofa thrown up against the wall and broken in half  
23 by wind, and it has no value, the loss is set.

24 MR. COPELAND: Yes.

25 JUSTICE RANDOLPH: And then if the water comes in

1 and soaks that couch with a bunch of water, no loss, no  
2 additional loss or any loss has occurred as a result of  
3 that because it's already worthless.

4 MR. COPELAND: You cannot destroy that which has  
5 already been destroyed.

6 JUSTICE RANDOLPH: And that's the way that you're  
7 suggesting that --

8 MR. COPELAND: Yes.

9 JUSTICE RANDOLPH: -- if we make any revisions in  
10 her ruling, we understand that position.

11 MR. COPELAND: Yes, your Honor. You can  
12 certainly -- this Court obviously can do what it wants to  
13 do, and you may feel the need to expound greater than did  
14 Judge Dodson. But the truth is, from my experience in  
15 trying these cases, ultimately what you get down to is the  
16 jury instructions.

17 And that jury instruction, as it has in every one of  
18 the cases I've tried, says that USAA has the burden -- or  
19 other companies, have the burden of proving by a  
20 preponderance of the evidence what damage or loss, damage  
21 that led to loss, result was proximately caused or  
22 contributed to by storm surge flooding.

23 And to the extent that they do that, they don't pay  
24 for it under the policy. To the extent that they have  
25 failed to meet that burden of proof, they do pay for it

1 under the policy.

2 JUSTICE PIERCE: So, therefore, y'all disagree  
3 with Nationwide's position?

4 MR. COPELAND: Yes. And I want to bring  
5 something else up, something that Mr. Cupit, my good  
6 friend, said about it -- or maybe it was General Hood said  
7 about that a lot of companies were saying because water  
8 touched it, we weren't going to pay it.

9 I've heard that, and I'm sure there were. But I can  
10 assure you that my own experience with many insurance  
11 companies is that they are exactly where USAA is on this.

12 The Court needs to understand that most of these  
13 cases, 95 percent of these cases, were resolved between  
14 the adjuster and the customer. You're seeing the  
15 unresolved cases, as is natural.

16 You're not hearing the insurance industry up here  
17 arguing that we do not pay for loss because water touched  
18 it or damage because water touched it. I believe by far  
19 the greatest part of the insurance industry paid for all  
20 the wind that was there.

21 The only denied payment was for that that was either  
22 totally caused by water or that where water was a  
23 contributing factor.

24 That is -- I want to go back to where I was just a  
25 moment with Judge Dickinson because I believe I may have

1 confused him. I don't want to. I'm trying to clarify.

2 There are two physical forces - wind and water. Two  
3 physical forces. Those two physical forces only leave  
4 three possibilities - all wind, all water, or a  
5 combination of those two physical forces.

6 All wind is covered in everybody's book. There has  
7 never been any dispute. All water, if we prove it - the  
8 burden is with us on structure - it's not covered.

9 This case is about - excuse my levity again - that  
10 tooth on a chicken perhaps. And you would say, well if  
11 it's not in this case, why are we dealing with it? I  
12 can't say it's not in this case. Ms. Guice can't say it's  
13 not in this case. I can't say it's in this case.  
14 Ms. Guice can't say it's in this case.

15 It is ultimately the jury that is the finder of fact.  
16 It is the jury that will hear from perhaps eyewitnesses -  
17 not in this case, but in other cases. They will hear from  
18 experts, lots of experts. They will hear about what  
19 happened to nearby homes, and they will hear about  
20 comparables of what happened to high on the house where it  
21 was not damaged, versus low where the water was.

22 It is for the jury to determine, of those three  
23 possible causes on any given item, what was the cause -  
24 pure water, pure wind, or an indivisible synergistic  
25 effect.

1           In this policy, that middle ground, as rare as it may  
2     be, it still has to be addressed. You still have to  
3     address it with the jury. You have to cover for them in  
4     instructions. You cannot leave them uninstructed on a  
5     potential fact issue.

6           JUSTICE RANDOLPH: But there's not a potential  
7     fact issue on the fact it's not synergistic, is there?  
8     Because you have testimony from everyone from both sides  
9     that the wind, the high winds, came hours before the high  
10    water came in this case. I'm not speaking to all cases,  
11    but in this case.

12          MR. COPELAND: Your Honor, on those facts of when  
13    the water and wind came, they are largely disputed.

14          USAA's position in this case, as has been most -- I  
15    mean, there has been a dispute between the meteorologists  
16    and the wind scientists - the wind came first. The water  
17    followed the wind.

18          How much water was there when the peak winds reached,  
19    how much higher the water got after the peak winds, those  
20    can all be in dispute.

21          JUSTICE RANDOLPH: Okay.

22          MR. COPELAND: And they're disputed in every  
23    case. And they're even disputed among experts on the same  
24    side in inconsistencies. So that draws --

25          JUSTICE CHANDLER: But back to the jury



1 instructions --

2 MR. COPELAND: Yes, your Honor.

3 JUSTICE CHANDLER: And back to this word of  
4 "synergistic" or concurrent combined forces of wind and  
5 water, if the jury is told that if they believe it was a  
6 combined concurrent force of wind and water that caused  
7 the damage, you're going to say that the Plaintiff is not  
8 entitled to damages?

9 MR. COPELAND: Yes, sir.

10 JUSTICE CHANDLER: But now as I understood the  
11 Plaintiff, the Plaintiff is going to argue that, if there  
12 are combined forces, then they are entitled to payment  
13 because the per square inch of force from water alone is  
14 insufficient to cause the damage.

15 MR. COPELAND: Yes, sir.

16 JUSTICE CHANDLER: That's really the disagreement  
17 between the two sides that matters; is that correct?

18 MR. COPELAND: Yes, sir. And that's what this  
19 second sentence in this policy addresses.

20 JUSTICE CHANDLER: I'm looking at it.

21 MR. COPELAND: And it was -- it had to go  
22 somewhere. It did not go in the homeowner's policy. It  
23 went in the National Flood Insurance. That's what  
24 Congress did.

25 We all subsidize that by 25 percent. It benefits from

1 the spread of risk because it's a nationwide spread of  
2 risk.

3 What you're simply saying, if you force flood  
4 insurance for that combined flood insurance into this  
5 policy, you're double covering it with the National Flood  
6 Insurance Program. And what you're doing is you're double  
7 covering it at a much higher premium.

8 As strange as it may seem, insurance is designed to  
9 fit. Clearly wind is covered; clearly water is not. It's  
10 this in between that a jury might find. And you have to  
11 deal with the possibility that a jury might say, 'What do  
12 we do about the combined?'

13 JUSTICE DICKINSON: Mr. Copeland, you're saying  
14 three, and I'm still seeing four. I'm still seeing this  
15 middle ground where there are concurrent causes. There  
16 are two different; you've got wind and water.

17 MR. COPELAND: Yes, sir.

18 JUSTICE DICKINSON: And in a hurricane situation  
19 - I've been through a lot of them - you've got a storm  
20 surge, and the waves keep hitting the house, and they keep  
21 hitting whatever they're hitting, and the wind is  
22 blowing.

23 And suppose a jury determined -- because this is what  
24 I thought I heard you say a minute ago. I thought I was  
25 with you until you have confused me a little bit.

1 Under a circumstance where there's a storm surge  
2 that's continually beating on a structure, and there's a  
3 wind that's continually blowing. And assume that the  
4 experts agree that the wind would have blown it down  
5 without the water, and the water would have blown it away  
6 without the wind.

7 I've understood you to say that even though those are  
8 concurrent problems, you would pay because you've used the  
9 language "but for."

10 You're defining -- you're defining a concurrent  
11 proximate cause under the "but for" test.

12 MR. COPELAND: Yes, sir.

13 JUSTICE DICKINSON: But for -- but for the water,  
14 it wouldn't have happened.

15 MR. COPELAND: Yes, sir. If you had a video --

16 JUSTICE DICKINSON: I'm just saying I just want  
17 to make sure you're not just saying just a contributing --

18 MR. COPELAND: Yes, sir.

19 JUSTICE DICKINSON: -- cause; you're saying you've  
20 got to go one step further. And you've got to prove that,  
21 had there been no water, this damage wouldn't have  
22 occurred?

23 MR. COPELAND: Right.

24 JUSTICE DICKINSON: That's where I thought you  
25 were.

1 MR. COPELAND: I take that to be the word  
2 "contributing."

3 JUSTICE DICKINSON: Okay.

4 MR. COPELAND: To me, the --

5 JUSTICE DICKINSON: And you would have no trouble  
6 if Judge Dodson's order, and if the jury instruction you  
7 later proposed to submit to the jury in this case, said  
8 exactly that?

9 MR. COPELAND: The jury instruction, it can say  
10 that, your Honor.

11 JUSTICE DICKINSON: You would not object to it?

12 MR. COPELAND: Well, the jury instruction that  
13 Judge Senter has been giving, and the one that I've read  
14 over and over that Judge Dodson referred to in her  
15 opinion, says "caused or contributed to."

16 Now, if you want to define what "contributed to"  
17 means --

18 JUSTICE DICKINSON: I do.

19 MR. COPELAND: Then that would certainly be in  
20 order.

21 JUSTICE DICKINSON: But for is your definition?

22 MR. COPELAND: Your Honor --

23 JUSTICE DICKINSON: The "but for" test?

24 MR. COPELAND: Let me go back. There is one part  
25 I want to clarify. If you -- because you threw me this

1 time. You confused me.

2 When you asked the question about the water was  
3 beating on it, and the water --

4 JUSTICE DICKINSON: You've got damage that was  
5 caused by two forces. Two forces were happening, but had  
6 there been no water, it still would have happened. The  
7 wind was enough. All the engineers say the wind was  
8 strong enough that under these circumstances, even if  
9 there had been no water, it would have happened.

10 And they also say even if there would have been no  
11 wind, it would have happened with the water.

12 MR. COPELAND: Yes, sir.

13 JUSTICE DICKINSON: You're saying that even under  
14 those circumstances, your client would pay because but for  
15 - the but for test?

16 MR. COPELAND: Exactly, with one caveat.

17 JUSTICE DICKINSON: Okay.

18 MR. COPELAND: And that is the same caveat, the  
19 same position, that we extend to Justice Randolph's  
20 couch.

21 If we had a video, and it showed that the water  
22 knocked it down before the wind ever got there, it's the  
23 same thing. There's no house left to destroy.

24 JUSTICE DICKINSON: That's your problem, in terms  
25 of the burden of proof.

1 MR. COPELAND: The way that you were saying it,  
2 it causes me that concern. I have no problem with the  
3 "but for" as long as you don't get them totally flipped in  
4 sequence. We're all sitting here assuming that the wind  
5 did its damage first, but let's assume we had a video to  
6 the opposite. That makes that "but for" a little more  
7 problematic.

8 It's not that complicated. It's really not. We've  
9 tried these things and, hey, the juries are awarding the  
10 damages. Look at my results.

11 The reality is that the phrase "caused or contributed  
12 to" -- my concern -- I don't think this Court has any  
13 problem with all flood. I don't think this Court has any  
14 concern with all wind. I'm concerned that you might be  
15 saying, 'Why are we worried about this middle,' you know.  
16 'If it's so infrequent, why are we worried about it?'

17 Because of my experience with juries, you have to  
18 instruct juries on all possibilities. And it is a  
19 possibility.

20 JUSTICE DICKINSON: I think what we're concerned  
21 about is that, in a hurricane, you've got wind, and you've  
22 got water.

23 MR. COPELAND: Yes.

24 JUSTICE DICKINSON: And for an insurance company  
25 to just walk in and say, 'Well, there was wind,' or,

1 'There was water, so we don't cover anything,' doesn't  
2 address the problem.

3 MR. COPELAND: And we agree. I am 100 percent  
4 with that, and I think you'll find 95 percent of the  
5 insurance industry is 100 percent with that.

6 We took on the obligation to pay for wind, and we've  
7 looked for wind and paid for wind; it doesn't matter what  
8 water would have done later.

9 JUSTICE WALLER: Mr. Copeland --

10 JUSTICE GRAVES: Apparently Nationwide is not in  
11 agreement with that.

12 MR. COPELAND: You heard that Nationwide --

13 JUSTICE GRAVES: Because I hear them saying that  
14 sequencing is important, and what you're saying is that it  
15 is of no consequence, - the sequence.

16 MR. COPELAND: I'm saying the word in that  
17 sentence that's important, the word that is the word  
18 "contributing" - "caused or contributed to by water." I  
19 don't care what the sequence is.

20 JUSTICE GRAVES: Although it says that in your  
21 contract -- in your policy?

22 MR. COPELAND: It's in the policy, your Honor.  
23 But as I've explained before, the reason to me -- and I'm  
24 sorry it's not here anymore -- it says "concurrent or in  
25 any sequence." Can we come up with anything that they

1 almost are -- they cancel each other out because  
2 everything is either concurrent or in sequence. That's  
3 all there is.

4 JUSTICE PIERCE: So is it ambiguous?

5 MR. COPELAND: No. It's just not needed. The  
6 word is "contributed."

7 JUSTICE PIERCE: Real quick, in your brief, you  
8 said that you want to use the flood damage receipt by the  
9 Corbans to meet your burden. How do you propose to do  
10 that?

11 MR. COPELAND: Well, when we talked about this  
12 before, one point that did not come up - it came up, but  
13 not at the same time - it is, as we clearly accept, if the  
14 Corbans come in on the structure -- keep this on the  
15 structure. If the Corbans come in and say, 'We have  
16 suffered a direct physical loss,' and it's a request for  
17 admission, we would readily admit that. We know they did.  
18 And it's a tragedy that it happened. They can sit back  
19 down.

20 So really we come in with the burden of proof with  
21 that established, as we accept the burden of proof. And  
22 where that is an issue, and where it comes up in the  
23 courtroom is when you get experts that want to say that  
24 there was no flood damage.

25 And it simply does not benefit the pursuit of justice



1 for a party, whether it be USAA or the Corbans, or anyone  
2 else, to make a claim and accept \$350,000 in flood damage,  
3 and then put on a paid witness to say that that did not  
4 occur. That simply does not benefit the trying to find  
5 what's true and right.

6 JUSTICE WALLER: Any further questions?

7 (No response.)

8 MR. COPELAND: Thank you very much.

9 JUSTICE WALLER: Thank you, Mr. Copeland.

10 MS. GUICE: What an interesting afternoon we're  
11 having. The direct question was asked, which I want to  
12 address immediately, and that is "Why are we here?" And I  
13 have two answers to that question.

14 The first answer is: I suppose that I'm here so I  
15 could get the concessions from Mr. Copeland that I got  
16 when he stood up to admit all of these things that were  
17 not admitted before Judge Dodson; that were not admitted  
18 in the motion for summary judgment they filed; that were  
19 not admitted in their brief; but we got them today.

20 So that in and of itself is worth the price of  
21 admission.

22 The second reason, though, and the more serious reason  
23 -- I don't want to act too much in jest because it is an  
24 extremely, extremely serious issue that Dr. and  
25 Mrs. Corban have to travel here almost four years after

1 they lost their house to hear two of the major insurance  
2 companies in the country quibble about application versus  
3 interpretation, and about how something could be  
4 sufficient to cause a loss, and therefore they're not  
5 going to pay them their premiums - very serious business.

6 But the real reason we're here is because Judge Lisa  
7 Dodson felt compelled, based on a motion filed by USAA, to  
8 follow a decision of the Fifth Circuit Court of Appeals in  
9 the Leonard decision - Leonard versus Nationwide.

10 Nationwide's attorneys are partly responsible for it.

11 And that Fifth Circuit opinion that was followed held,  
12 "Pursuant to Leonard and Tuepker, the ACC clause will be  
13 applied herein; the Corbans may not recover for any damage  
14 caused by water as defined in the policy or a combination  
15 of water and wind." Their motion.

16 The combination of water or wind mistakenly referred  
17 to by me, in following the Fifth Circuit language, is  
18 indivisible, and I do apologize for that mistake. I  
19 appreciate the opportunity to fix it.

20 That language wasn't invented by me. It was invented  
21 by the Fifth Circuit. They used it in Tuepker. It's  
22 really not indivisible. It's really indistinguishable.  
23 It's really indistinguishable.

24 JUSTICE GRAVES: Do you agree with the first part  
25 of the ruling; that they shouldn't recover for any damage

1 caused by water?

2 MS. GUICE: I agree that they shouldn't recover  
3 for any damage that USAA can prove was caused by water.  
4 Absolutely, you Honor.

5 JUSTICE DICKINSON: What about the second part?  
6 Do you agree with Mr. Copeland's recent - as you say -  
7 explanation or interpretation of that terminology  
8 concurrent, when he says that what they have to prove, in  
9 order to not pay a particular damage or loss that they're  
10 trying to recover, what they have to prove is that there  
11 was water involved, there may have been wind involved?  
12 But using the "but for" test, if there hadn't been any  
13 water, you would have had no loss.

14 He says he's got to prove that, if you broke a pole or  
15 blew out a window, he's got to prove that window would  
16 still be there, if there had been no water.

17 MS. GUICE: You know, I like that. You know, and  
18 if Judge Dodson had said that in her opinion --

19 JUSTICE DICKINSON: Okay.

20 MS. GUICE: -- we would be happy. We would be at  
21 trial.

22 But that didn't happen, and instead Judge Dodson was  
23 relying on the example that the Fifth Circuit gave in  
24 Leonard that said, if the roof is busted, rainwater comes  
25 in and causes damage, we're not going to pay that if the

1 flood water impacted the same part of the property.

2 JUSTICE WALLER: Ms. Guice, then do you agree  
3 with Judge Senter in the Dickinson Two, or the  
4 reconsideration, his analysis of how the anti-concurrent  
5 clause should be applied?

6 MS. GUICE: I agree with Judge Senter to the  
7 extent that he said the anti-concurrent cause clause  
8 really did not apply in situations like Hurricane Katrina  
9 where there are two separate forces.

10 I can't say that I agree with everything Judge Senter  
11 has said in some of these opinions because it's very  
12 conflicting.

13 And as an example, I'll use the page 282 that your  
14 Honor, Justice Randolph, discussed with Mr. Copeland, the  
15 jury instruction in the Aiken case where he read out that  
16 the Plaintiffs -- I mean that USAA had the burden of  
17 proof.

18 Well, the second page of that instruction is on page  
19 283. In there Judge Senter gave, at Mr. Copeland's  
20 request, who now argues otherwise, the instruction that  
21 says the Plaintiffs have the ultimate burden of proving  
22 that their losses are covered under the USAA policy.  
23 That's the opposite of what Mr. Copeland is saying now.

24 The instruction went on to say, "The Plaintiffs have  
25 the ultimate burden of proving the extent of their

1 losses." That's the opposite of what Mr. Copeland is  
2 saying today.

3 Moreover, the USAA case of Aiken versus USAA that he  
4 quotes this jury instruction from was recently affirmed by  
5 the Fifth Circuit Court of Appeals. And in that opinion,  
6 the Fifth Circuit quotes extensively from USAA's expert  
7 opinion where the engineers told USAA point blank, "We  
8 cannot attribute the difference between what damage was  
9 caused by wind and what damage was caused by water."  
10 USAA's own engineer told them that.

11 Did they go out and pay, like Mr. Copeland has told  
12 this Honorable Court they would do under those  
13 circumstances? No.

14 What did they do? They forced the insureds, just like  
15 they're forcing the Corbans to go to court, to battle it  
16 out, to spend tens of thousands of dollars on experts,  
17 experts who, like our expert, Mr. Biddy, are forthright in  
18 saying, 'I believe the damage occurred by wind before the  
19 water got there, but I got to tell you, you can't tell 100  
20 percent how much was wind and how much was water.'

21 He says that. That's in the record.

22 JUSTICE CHANDLER: Well, Ms. Guice --

23 MS. GUICE: Yes, your Honor?

24 JUSTICE CHANDLER: As I understand Mr. Copeland's  
25 position, and you seem to be embracing it, that would mean

1 a directed verdict against your client because water was a  
2 contributing force.

3 MS. GUICE: And I would submit really that's the  
4 end result of the Leonard and Tuepker decision. The end  
5 result is -- and I don't agree that that should be the  
6 result.

7 The end result is, you get paid for your roof -- you  
8 get paid \$39,000, but as far as the million dollars in  
9 losses to your house, you don't get paid.

10 JUSTICE CHANDLER: Wait, now; I want to  
11 understand your position.

12 Combined concurrent forces of water and wind; neither  
13 single force is sufficient to cause a damage resulting in  
14 loss. The two combined do cause a loss or cause damage  
15 that results in loss.

16 You're saying you agree with that language?

17 MS. GUICE: No, your Honor. Let me say this as  
18 to this synergistic -- so-called synergistic damage,  
19 scientifically it cannot exist because the basic law of  
20 physics is that two forces can't occupy the same space at  
21 the same time. You can't have wind and water operating at  
22 the same time, so this is a strawman --

23 JUSTICE CHANDLER: So you're saying there's no  
24 such thing as combined forces of water and wind --

25 MS. GUICE: Not in the context of --

1 JUSTICE CHANDLER: -- they are always singular?

2 MS. GUICE: Not in the context of them both  
3 acting at the same time.

4 Now, combined water and wind could be, for example,  
5 you know, the wind throws a tree limb through a pane of  
6 glass, and then the water comes up and knocks it all  
7 away.

8 JUSTICE CHANDLER: I'm not talking about that.  
9 I'm talking about what we get when we get an extreme storm  
10 - high winds and lots of water blowing. That's not a  
11 combination of wind and water concurrently? Those are two  
12 separate phenomena?

13 MS. GUICE: That's correct. That's my  
14 understanding. And that's not the situation where the  
15 Fifth Circuit was speaking of combined.

16 The Fifth Circuit's view of combined damages of wind  
17 and water was -- and they say it point blank. And that's  
18 what Judge Dodson felt compelled to follow, even though  
19 she didn't agree with it -- is that if you have wind  
20 damage to a part of the house that is later impacted by  
21 water, they do not have to pay under the ACC.

22 That's what the Fifth Circuit held in Leonard and  
23 Tuepker. That's what Judge Dodson put in her order.  
24 That's what she meant by combined forces.

25 And it's crystal clear when you read the transcript of

1 the oral argument that we had with Judge Dodson before she  
2 entered that ruling that that was what was being advocated  
3 by the attorneys for USAA.

4 In fact, Judge Dodson asked Mr. Thompson during the  
5 oral argument specifically about what the Fifth Circuit  
6 held in Leonard, specifically about the example being  
7 given that, if wind damages the roof causing rainwater to  
8 come in and create damage inside the home, and then storm  
9 surge later comes in and impacts the same property, is  
10 that covered or not covered - the initial damage from the  
11 rain.

12 Judge Dodson asked him that specifically, and he  
13 specifically said it is not covered, that's what the Fifth  
14 Circuit held in Leonard, and that's what we're arguing.

15 So again, just by showing up, we have -- we've reached  
16 some common ground, but I would submit to you that it's  
17 more for purposes of keeping this out of a Court, from  
18 writing an opinion that is clear that will guide everyone  
19 in these cases, that will tell the Fifth Circuit and  
20 declare point blank without equivocation that the Fifth  
21 Circuit is wrong. The Fifth Circuit is wrong.

22 JUSTICE CHANDLER: Let me ask you now -- I don't  
23 want to belabor the point, but I do want to understand  
24 it.

25 MS. GUICE: Yes, your Honor.



1 JUSTICE CHANDLER: And some things take me a  
2 while to understand, and this is one concept that's giving  
3 me trouble.

4 Here's the language in the policy: "Such loss is  
5 excluded regardless of any other cause or event  
6 contributing concurrently or in any sequence to the loss,"  
7 and then it lists water damage.

8 So if water is a contributing cause concurrently with  
9 wind, you say that's an impossible event; they're always  
10 separate?

11 MS. GUICE: Your Honor, the language of the  
12 provision that says such loss is excluded regardless of  
13 whether it acts with another peril or another force, the  
14 critical words are "such loss."

15 Such loss refers to loss caused by water damage. That  
16 water damage loss is excluded, even if wind caused the  
17 water to rise, which caused the loss. That's what the ACC  
18 means. Such loss always refers to the water damage  
19 because that's the way the clause was written by USAA.

20 USAA says, "We do not pay for the following -- for  
21 loss caused by the following: Water damage. We do not pay  
22 for such loss, that is the loss caused by water damage,  
23 regardless of whether another event occurs concurrently or  
24 in sequence."

25 It's only the water damage loss that is excluded. The

1 wind loss is not excluded. It's never excluded. The wind  
2 loss is always covered because it's an accidental direct  
3 physical loss, and this policy covers all accidental  
4 direct physical loss unless excluded. The only exclusion  
5 is the water damage loss.

6 Yes, that water damage loss says it's excluded, even  
7 if wind causes the water to rise. But the policy only  
8 covers and excludes losses. It does not cover and exclude  
9 perils. So just because flood exists means nothing. The  
10 important and critical factor is what damage was caused by  
11 that water damage -- what loss.

12 Excuse me, Mr. Justice Randolph, you're so correct.  
13 It's not damage; it's loss. What loss was caused by the  
14 water damage.

15 If they can't prove what loss that was, they have to  
16 pay it all. And they just give lip service before this  
17 Court today to say they're applying it differently.

18 And Nationwide, to have the temerity to come in here  
19 and say that, 'We pay for nothing because the water would  
20 have been sufficient.' The water would have been  
21 sufficient even though damage -- property is destroyed,  
22 they'll pay for nothing?

23 Well, you know, I mean a pair of scissors is  
24 sufficient to cut my jacket, but that don't mean it's cut,  
25 you know. So that's ridiculous. Four years after this

1 storm, they're taking those kinds of positions?

2 JUSTICE CHANDLER: Ms. Guice, let me ask you now

3 --

4 MS. GUICE: Yes, your Honor?

5 JUSTICE CHANDLER: Are you saying exactly what  
6 David Rossmiller says in his article?

7 MS. GUICE: I believe --

8 JUSTICE CHANDLER: Is that your position?

9 MS. GUICE: I believe Mr. Rossmiller has spelled  
10 it out correctly. Yes, your Honor.

11 JUSTICE CHANDLER: And that is certainly  
12 contrary, as I understand it, to what Mr. Copeland's  
13 position is.

14 MS. GUICE: Your Honor, Mr. Copeland's position  
15 has changed, not only so much over the past several years,  
16 but even today, I'm really not sure exactly where we are  
17 with him. I apologize.

18 But I believe that there are indeed different  
19 positions.

20 JUSTICE CHANDLER: Well, I think I understand  
21 where he is, and what he is saying is -- and I don't want  
22 to debate this with you, but what he's saying is, but for  
23 the water, there would be no loss. And if he shows that,  
24 then there's no -- the Plaintiff is entitled to no  
25 damages.

1 MS. GUICE: If USAA --

2 JUSTICE CHANDLER: In other words, back to his  
3 example, 70 per square inch of force with the water, 50  
4 per square inch of force with the wind, total 100 per  
5 square inch of force, that is sufficient to break the pane  
6 that will withstand 100 per square inch of force.

7 Your position is your client would be entitled to  
8 recover. His position is that there would be nothing  
9 owed.

10 MS. GUICE: Our position is that our client would  
11 be entitled to recover, but our position also is that is  
12 not the context in which this ACC presents itself in 99.99  
13 percent of the cases.

14 JUSTICE PIERCE: Ms. Guice?

15 MS. GUICE: Yes, your Honor?

16 JUSTICE PIERCE: If you can touch on the issue on  
17 the flood insurance and how that would play out in the  
18 trial below, and I would like to hear your take on it.

19 MS. GUICE: Yes, your Honor. I appreciate the  
20 opportunity to do that.

21 What the insurance industry is trying to do is relieve  
22 itself of the burden of proof by the fact that flood  
23 insurance payments were made to the Corbans and others  
24 similarly situated.

25 That is an improper avenue for them to follow. The

1 record in this case is clear of a couple of things that  
2 are important.

3 First, that the flood insurance was paid by USAA.  
4 They were the right your wrong carrier that made the  
5 decision that they could pay flood insurance to the  
6 Corbans. So, number one, they're acting in their own  
7 interest in making that determination.

8 They determined they had enough evidence immediately  
9 after the storm to pay the flood insurance, even though  
10 they claimed they didn't know what the cause was, and  
11 therefore couldn't pay any wind damage.

12 But the other important and perhaps most important  
13 factor is that the National Flood Insurance Program  
14 determined early on that it would resolve all doubts  
15 concerning coverage in favor of the insured, exactly what  
16 we're asking the Court to declare the law of Mississippi  
17 to be here.

18 So if the doubts are resolved by the flood carriers,  
19 and properly so in favor of coverage, and if USAA is the  
20 company deciding to make the payments, then how in the  
21 world does the acceptance of flood proceeds under an  
22 insurance policy that the Corbans have paid for, for all  
23 these years, where they don't have to sign a proof of  
24 loss, the check is given to them when they are homeless,  
25 when they are trying to determine how they can change an

1 office into living space, where they are trying to  
2 determine how to make repairs to their home, and where  
3 USAA is saying, "We still have to investigate the wind  
4 loss," you Honor, I would submit that it is of no  
5 probative value.

6 And if it is of any probative value, that under 403 it  
7 should be excluded. It should be excluded because, number  
8 one, it's unduly prejudicial. There is no direct link  
9 between the acceptance of flood proceeds under these  
10 circumstances and any fact in issue.

11 Number two, it should be excluded under 403 because it  
12 would constitute an undue waste of time because then we  
13 would have to put in all this proof about how USAA did it  
14 based on their own self-interest at heart, how the  
15 government accounting office has issued reports saying  
16 that there was insufficient proof after Hurricane Katrina  
17 for payments to be made, making recommendations that there  
18 are conflicts of interest under circumstances such as  
19 where USAA has both the homeowners and the flood.

20 All of that would have to come in --

21 JUSTICE DICKINSON: You're not saying that --  
22 you're not saying that if one of your witnesses at trial  
23 testifies, one of your experts or Dr. Corban testifies  
24 there was no flood damage to that home, that the Defendant  
25 doesn't have a right to say, 'Well, you accepted flood

1 insurance benefits?' You're not saying that, are you?

2 MS. GUICE: No, your Honor, I'm not.

3 JUSTICE DICKINSON: Okay. Well, I understood --  
4 maybe I understood Mr. Copeland incorrectly, but I  
5 understood him to say they don't plan to use that, unless  
6 it's a proper predicate is laid, to me meaning that it's  
7 used for impeachment or some appropriate purpose; that  
8 he's not going to stand up and just say that.

9 MS. GUICE: Well, but he never told us what he  
10 thought a proper predicate would be. And we do know from  
11 the motion he filed and the pleadings that were filed in  
12 the case that he has advocated that it is a judicial  
13 admission that the insurance company could talk about it  
14 in opening statements. That's in the record, your Honor.

15 JUSTICE DICKINSON: So you're saying his position  
16 today is a new one?

17 MS. GUICE: Yes, sir, it is.

18 JUSTICE DICKINSON: Okay.

19 JUSTICE RANDOLPH: But you started out this case  
20 asking to be paid for water and wind damage; did you not?

21 MS. GUICE: Your Honor, frankly --

22 JUSTICE RANDOLPH: I'm going back to the  
23 Complaint, and I went to the Complaint and the Answer and  
24 walked all the way through it. So it looks like you  
25 started out there.

1 MS. GUICE: I will defer to your Honor's more  
2 recent reading of the Complaint than my own.

3 JUSTICE RANDOLPH: But the position you're taking  
4 today is whatever -- I'm going to prove my total damage --  
5 let's get back to this instruction you're talking about.

6 MS. GUICE: Yes, sir.

7 JUSTICE RANDOLPH: It would be your obligation for  
8 Mr. Corban back there to get up there and say, 'I lived  
9 out there. I left. My house looked like this before I  
10 left. Here is how it looked when I got back. Here is my  
11 insurance contract. Pay me.'

12 MS. GUICE: Yes, your Honor.

13 JUSTICE RANDOLPH: And then Greg will put his  
14 people on -- you could do that, or you might even use an  
15 expert witness along in there.

16 And then he would get back up and say it ain't so, and  
17 here is why it is not.

18 And that's what y'all are down to now. Are we all in  
19 agreement about that?

20 MS. GUICE: Well, but we still have this problem  
21 with does the ACC cover or not cover damage where both  
22 wind and water may have contributed to the same loss.

23 JUSTICE RANDOLPH: Well, I'm convinced in the  
24 record that there's not a concurrent loss. I mean, the  
25 record shows that.



1 MS. GUICE: Could we have a vote on that?

2 JUSTICE RANDOLPH: Well, you know, every now and  
3 then I'll get in the dictionary and just look, and from  
4 these fellow justices who serve as circuit judges,  
5 concurrent and cumulative are two different things.

6 And I don't think that's -- but that's the issue that  
7 you're concerned about, and we'll deal with it  
8 accordingly.

9 MS. GUICE: My client --

10 JUSTICE WALLER: Ms. Guice?

11 MS. GUICE: Yes, your Honor?

12 JUSTICE WALLER: Your time is up. Is there any  
13 further questions?

14 JUSTICE CARLSON: I just have one. I want to make  
15 sure. It sounds like maybe there may be an agreement on  
16 that it boils down to but for -- but for the water.

17 And that's going to be what the Defendants would have  
18 to prove, and I want to see if you agree that but for the  
19 water, the loss would not have occurred. That's what it  
20 boils down to; is it not?

21 MS. GUICE: That's what I understood Mr. Copeland  
22 to be agreeing to today; that unless he can prove, but for  
23 the water, damage would not have occurred or the loss  
24 would not have occurred to any particular part of the  
25 house, then what he's admitted to today on this record,

1     which I understand is taped, is --

2             JUSTICE CARLSON:  And you would agree with that  
3     approach that that's his burden that, but for the water,  
4     the loss would not have occurred?

5             MS. GUICE:  I do agree that that's his  
6     obligation.

7             JUSTICE WALLER:  Thank you, Ms. Guice.

8             MS. GUICE:  Thank you.

9             JUSTICE WALLER:  The Court is going to consider  
10    the briefs filed in this case and the amicus, and we will  
11    also have the benefit of the oral argument that we've had  
12    today.  We will study the issues and render a decision in  
13    course, and Court will stay in recess until then.

14            BAILIFF:  All rise.

15                    (Conclusion of Transcript)

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